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Supreme Court of the United States

October Term, 1998

QUALITY PROFESSIONAL NURSING, INC., CRITICAL HEALTH CARE, INC., A COMPLETE HEALTH SERVICE, INC., ALL CARE NURSING SERVICE, INC., AND THE PDQ NURSE, INC.,

Petitioners,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., and HIGH TECH STAFFING SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER, DURING AN EXTENDED NURSING SHORTAGE CAUSING FREQUENT FREE-MARKET PRICE INCREASES FOR TEMPORARY NURSING SERVICES BEING SOLD BY AGENCIES TO HOSPITALS, *PER SE* ILLEGAL HORIZONTAL PRICE FIXING – BROADLY DEFINED BY THIS COURT TO ENCOMPASS PRICE CAPPING AND PRICE STABILIZING – RESULTED WHEN ALMOST ALL COMPETING HOSPITALS IN PALM BEACH COUNTY, FLORIDA, COMBINED (WITH YET OTHER PARTIES): (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES); AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS?

II. WHETHER, IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT, A COMBINATION OF COMPETING HOSPITALS (WITH YET OTHER PARTIES) – (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES), AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS – CONSTITUTED A *PER SE* ILLEGAL GROUP BOYCOTT AGAINST EXCLUDED AGENCIES?

III. WHETHER, IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT, A COMBINATION OF COMPETING HOSPITALS (WITH YET OTHER PARTIES) – (1) TO JOINTLY LIMIT THE NUMBER OF AGENCIES WITH WHICH THE HOSPITALS WOULD DO BUSINESS (ABSENT EXIGENT CIRCUMSTANCES), AND (2) TO JOINTLY FORCE EACH CHOSEN AGENCY TO AGREE

QUESTIONS PRESENTED – Continued

NOT TO RAISE ITS PRICES FOR THE NEXT YEAR AND TO OFFER IDENTICAL PRICES TO ALL PARTICIPATING HOSPITALS – BY ENGAGING IN A NAKED RESTRAINT ON FREE-MARKET PRICING, SHOULD BE SUMMARILY CONDEMNED AS A VIOLATION OF ANTITRUST LAW UNDER THE RULE OF REASON, WITHOUT REQUIRING A SHOWING OF MARKET POWER WITHIN A RELEVANT MARKET?

LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS

There are no other corporations which are related to the corporations which are the petitioners herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Pre-Violation: A Nursing Shortage Led To Competition And Free-Market Price Increases 2

B. The Violation: Competing Hospitals Joined Together To Restrain Free-Market Prices 5

C. The Hospitals And The SFHA Admitted That They Jointly Implemented The PPP To Fix And Stabilize Prices 8

D. Impact Of The Preferred Provider Program 9

E. Disposition Of The Case By The District Court Below 11

F. Disposition Of The Case By The Court Of Appeals 13

REASONS TO GRANT THIS PETITION 17

I. PUBLIC ANTITRUST POLICY, THIS COURT'S COMMITMENT TO THE *PER SE* RULE FOR HORIZONTAL COLLUSION, AND AVOIDANCE OF CONFLICTS AMONG CIRCUITS, ALL FAVOR GRANTING THIS PETITION ... 17

TABLE OF CONTENTS – Continued

Page

II. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF HORIZONTAL PRICE FIXING MUST BE OVERTURNED 19

A. The Standard For Price Fixing Was Misconstrued 19

B. The *"BMI"* Exception To *Per Se* Illegality Was Misconstrued 23

C. The Court Below Deemed Horizontal Conduct To Be Vertical 25

D. The PPP Was Not An Instance Of Procompetitive Group Buying 26

III. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF *PER SE* ILLEGAL GROUP BOYCOTTS MUST BE OVERTURNED 27

IV. THE PPP SHOULD BE SUMMARILY CONDEMNED EVEN UNDER THE RULE OF REASON 28

CONCLUSION 30

APPENDIX TABLE OF CONTENTS ..... App. i

TABLE OF AUTHORITIES

Page

CASES

All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc., 135 F.3d 740 (11th Cir. 1998) 1

All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc., 887 F.2d 1535 (11th Cir. 1989) 12

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) 21

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 25

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 19, 23, 24, 25

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 26

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 22

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 29

FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) 17, 25, 27

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 25

Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) 19

National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) 24

National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965) 18

NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) 23, 24, 25, 28

TABLE OF AUTHORITIES – Continued

Page

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).....26, 27

Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) 15, 17, 19, 20

Palmer v. BRG of Georgia, Inc., 874 F.2d 1417 (11th Cir. 1989) 20, 21

State Oil Co. v. Khan, 522 U.S. 3 (1997)..... 18

United States v. Linseed Oil Co., 262 U.S. 371 (1923) 21

United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)..... 21

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).....20, 22

United States v. Topco Associates, Inc., 405 U.S. 596 (1972)..... 17

STATUTES

15 U.S.C. § 1..... 2

15 U.S.C. § 4..... 2

15 U.S.C. § 12..... 2

15 U.S.C. § 16..... 2

28 U.S.C. § 1331..... 2

Fla. Stat. § 542.18..... 2

OTHER AUTHORITIES

"Statements of Antitrust Enforcement in Health Care" (Department of Justice and FTC), 4 Trade Reg. Rep. (CCH) ¶ 13,153 (August, 1996) 26

2 J.O. Von Kalinowski *Antitrust Laws and Trade Regulation* § 6A.03[1] (1992)..... 22

PETITION FOR WRIT OF CERTIORARI

The five Petitioners – Quality Professional Nursing Service, Inc., Critical Health Care, Inc., A Complete Health Service, Inc., All Care Nursing Service, Inc., and The PDQ Nurse, Inc. – respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals (App. 1-20) is reported at *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 135 F.3d 740. Denials of petitions for rehearing and suggestions of rehearing *en banc* (App. 51-53, App. 54-55) are unreported. The district court's judgment (App. 21-28) and opinion denying post-trial motions (App. 29-50) are unreported.

JURISDICTION

The court of appeals affirmed judgments against petitioners in their consolidated appeal by order dated February 18, 1998, and denied petitioners' timely suggestions of rehearing *en banc* and petitions for rehearing, by unpublished orders dated May 18, 1998 (App. 51-53) and September 18, 1998 (App. 54-55). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1]

STATEMENT OF THE CASE

This case involves a challenge to price fixing and a group boycott by several competing South Florida hospitals directed against temporary nursing agencies. The key facts that led to this action in the district court for violations of Sherman Act § 1 (thus conferring jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. §§ 4, 12 and 16) are as follows:

A. Pre-Violation: A Nursing Shortage Led To Competition And Free-Market Price Increases

In the mid-1980s, a severe nursing shortage existed in Palm Beach County, Florida, including a shortage of nurses available to staff hospitals in that county.[2] The

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[1] Suit also was brought under Florida antitrust law, which for purposes of this action is identical to federal law, except that Florida law does not require proof of impact on interstate commerce. Fla. Stat. § 542.18, analogous to Sherman Act § 1, provides: "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." The parties have stipulated that the interstate commerce requirement has been met in this action.

[2] Typically, nurses worked either in hospitals, nursing homes, or physicians' offices. Nurses working in hospitals

shortage, which extended into the mid-1990s, mainly resulted from nurses' low compensation and unsatisfactory working conditions in hospitals, which caused many licensed nurses to drop out of the profession, and deterred new entry into the profession.

Prior to the shortage, hospitals mostly relied on staff nurses employed by hospitals. Hospitals customarily called on local temporary nursing service agencies to supply supplemental nurses during peak winter seasons, when Northern "snowbirds" swelled Florida's population, as well as to supply nurses to fill in for sick or vacationing staff nurses.

However, as the shortage continued, nurses increasingly left hospital employment to work for agencies, including petitioners, which offered higher compensation and better working conditions. By mid-1988, more than two dozen agencies in Palm Beach County were seeking to place nurses in hospitals. Fierce competition for nurse allegiance ensued among agencies and hospitals – a competition that the agencies increasingly were winning. The marketplace for nursing services was unconstrained. Each of Palm Beach County's 16 hospitals and each of the dozens of agencies was free to compete by offering nurses better compensation and conditions. There were no barriers to entry for new agencies. Likewise, the nurses, still in short supply, were free to choose among the various hospitals and agencies. Competition flourished.

("hospital nurses") generally were paid more than non-hospital nurses, worked under more demanding and stressful conditions, and were not interested in working outside a hospital setting.

The free market, and the law of supply and demand, were operating entirely properly in the face of a shortage: the competition for nurses was pushing nurse compensation up rapidly, largely due to the agencies' greater willingness to reward the nurses; and hospitals were experiencing frequent price increases from agencies – as often as three times a year. Consequently, nurses who had exited the market were returning to the practice.

Despite competition and spiraling prices, nursing compensation levels still were not high enough to reach what economists call the "equilibrium point" – i.e., the point at which supply and demand are equal, prices stabilize, and the shortage ends. (Conversely, during times of oversupply or glut, free-market prices fall, until the "equilibrium point" is reached and prices stabilize.) Because the nursing shortage persisted, free-market prices were expected to keep rising, fueled by agency competition.

The hospitals in Palm Beach County chose not to compete against one another and against the agencies for nurse allegiance. Rather, the hospitals sought to prevent or minimize further free-market price increases. But a single hospital, acting alone, found itself unable to halt the tide of rising prices, as nurses continued to flock to the agencies. The hospitals found their solution in combining their forces.[3]

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[3] The Director of Nursing for Palms West Hospital (a co-conspirator not a respondent herein) testified:

> "Q. Couldn't Palms West have entered into eight agreements with eight agencies that Palms West liked and thought were competent and had the best prices and quality that they could find without joining with ten other hospitals in Palm Beach County?

B. The Violation: Competing Hospitals Joined Together To Restrain Free-Market Prices

In mid-1988, 12 of the 16 competing hospitals in Palm Beach County conspired with the South Florida Hospital Association ("SFHA") to create a so-called Preferred Provider Program ("PPP").[4] Under the PPP:

- the hospitals **jointly** agreed to boycott all but an arbitrary eight agencies unless they could not get a nurse; the eight chosen agencies would be denominated "Preferred";
- the hospitals **jointly** agreed collectively to solicit price bids from all agencies in the county, with bidding agencies aware that they either would become Preferred, or would cease doing business with the bulk of Palm Beach County hospitals (and suffer potentially catastrophic losses as their hospital nurses deserted them to work instead for Preferred agencies or hospitals);[5]

"A. I have tried somewhat to do that on my own. It did not work."

[4] Of the remaining hospitals, one later withdrew; one refused to join on advice of counsel; and one declined to participate because it did not use agency services pursuant to a collective bargaining arrangement with its nurses.

[5] Respondent High Tech Staffing Services, Inc. ("High Tech") – which became Preferred – admitted (in its Brief filed with the court of appeals below, at pages 9-10):

> "The 'preferred provider' program was formulated and prepared by the Defendant Hospitals for the benefit of the Defendant Hospitals. . . . HIGH TECH was an unwilling participant in the program and did not benefit by its participation in the program.

- the hospitals **jointly** agreed to require each Preferred agency to quote **identical** prices to **every** participating hospital, without volume assurances;
- the hospitals **jointly** agreed to require each Preferred agency to freeze and stabilize prices to all participating hospitals, with no further increases for a full year;
- the hospitals **jointly** agreed to impose added costs, requiring Preferred agencies to pay for insurance coverage for nurses, to treat nurses as agency employees rather than independent contractors (thereby subjecting agencies to various employee taxes), and to pay a two-percent "commission" to the SFHA on all PPP revenues;
- the hospitals **jointly** agreed to require the Preferred agencies not to solicit staff nurses at any participating hospital for agency work during the term of the PPP and for six months thereafter; however,
- under the PPP, the hospitals **jointly** refused to provide any assurances to the Preferred agencies of volume purchases – a prerequisite to volume pricing.

Once the Program was implemented, and the Preferred agencies became locked into contracts, each hospital

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* * *

> "HIGH TECH was doing hospital staffing business at an annual rate of one million dollars prior to the Preferred Provider Program. **HIGH TECH had only three alternatives when it received the unsolicited Request for Proposal: (1) bid, and hopefully win and continue doing business; (2) not bid and walk away from one million in annual revenues;** and/or (3) file a frivolous antitrust complaint."

(Emphasis added.) Faced with such extreme choices, High Tech opted to submit a bid.

remained free to decide, on its own, which of the eight Preferred agencies would be called, and how much (if any) agency nursing services would be purchased by that hospital. In other words, each hospital simply continued to purchase as an independent economic unit and there never was any group buying; it was a sham. In the fall of 1988, acting on the hospitals' behalf, the SFHA sent Requests for Proposals to agencies in Palm Beach County. Most temporary nursing agency petitioners reluctantly submitted bids.[6]

The hospitals remained dissatisfied with the prices bid by the agencies, and intimidated many into lowering their prices by eliminating several bidding agencies – solely on the basis of price – and demanding re-bids from the rest. In so doing, the hospitals suggested an acceptable price range.

The bid (and re-bid) prices generally, and some of the accepted bid prices, were higher than prices the hospitals had been paying to agencies, simply to cover the added costs imposed by the hospitals (discussed above). But bids also reflected reduced agency profit margins.

No petitioner was among the eight agencies jointly selected by the hospitals and the SFHA to survive the boycott. Each of the Preferred eight agencies then entered into 12 mandatorily-identical contracts with each of the 12 participating hospitals. While there was some variation in bid price schedules from one Preferred agency to

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[6] The PPP also purported to address perceived quality problems from agency nurses. The quality issue, discussed below, was not related to the hospitals' goal of containing agency prices, and quality problems could easily have been resolved without implementing the price-fixing and boycotting features of the PPP described above.

the next, each Preferred agency was required to fix its charges at **exactly the same price** to every participating hospital. Moreover, all Preferred agencies agreed – under collective compulsion from the hospitals – that prices would remain fixed and stabilized for the coming year.

C. The Hospitals And The SFHA Admitted That They Jointly Implemented The PPP To Fix And Stabilize Prices

Internal SFHA memoranda prove the hospitals' goal to stabilize and cap prices:

> The [SFHA] believes that the nursing shortage problem requires a long-term commitment to be resolved. **It views the Temporary Agency plan** [viz., the PPP] **as a solution to the problem of cost spiraling** and providing controls on quality.

(Letter of August 3, 1988, from respondent SFHA's president to respondent Bethesda Memorial Hospital's Chief Financial Officer. Emphasis added.)

Even more strikingly, the SFHA officer with chief responsibility for the PPP wrote – in November 1988 – of a similar PPP already in effect in Broward and Dade Counties (located south of Palm Beach County), and stated (emphasis added):

> There's no need to rehash the data; there *is* a shortage of nurses. It's acutely felt by the hospitals in South Florida, and so it logically becomes an issue for the South Florida Hospital Association to address.
>
> * * *
>
> In Palm Beach County, a similar process was taking place. **Hospital directors of nursing concerned about the $8 ¼ million spent on temporary nursing services were joining together to**

create a program. Learning of the SFHA activity in Broward and Dade, they contacted the Association.

* * *

We intend to emphasize to our hospitals that the agencies that chose to participate in our RFP process and were chosen to become part of our program have made a serious and substantial commitment to our hospitals.

1. They have agreed to hold prices for one year.

2. They have fulfilled our requirements for quality assurance, staff selection and training, and evaluations.

3. They have agreed to an employer/employee relationship with their nurses working in our hospitals.

* * *

In future years, **we hope the program will help reduce prices paid for temporary nursing services. At this point, after numerous price increases as the nursing shortage increased, the program stabilizes prices. However, that in itself is an accomplishment.**

The same SFHA officer testified that a goal of the PPP was to "stabilize prices," and that by "stabilize" he meant "to help keep the prices from raising [sic] so frequently." Hospital nursing administrators testified to similar effect.

D. Impact Of The Preferred Provider Program

Under the PPP, each hospital agreed not to use non-Preferred agencies' services unless no Preferred agency could meet its needs. Consequently, if a hospital nurse working for one of the petitioner agencies desired to work in a hospital setting, that nurse faced a terrible

dilemma: remain with a petitioner agency and not get placed at any hospital, or switch to a Preferred agency or become directly employed as a hospital staff nurse.

The SFHA, acting on the hospitals' behalf, permitted the Preferred agencies to publicize their Preferred status in advertisements. The purpose was to lure hospital nurses away from non-Preferred agencies. That is precisely what Respondent High Tech did.

Predictably, almost overnight, hospital nurses deserted the non-Preferred agencies – a result which a top SFHA officer testified was "just common sense."[7]

Even the Preferred agencies suffered under the coercive terms of the PPP. While the bid prices had been higher than prices respondents previously paid (because those higher prices reflected higher costs, as noted above), Preferred agencies' profit margins per nurse placement actually **declined** under the PPP (a fact not disputed). The Preferred agencies had hoped to offset the lower profit margins under the PPP with a higher volume of placements; however, the hospitals expressly refused to offer any volume assurances to bidding agencies. In fact, so many nurses fled back to hospital employment in the wake of the agency crisis created by the PPP that the hospitals' needs for agency nurses actually **declined**,

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[7] For example, shortly after the PPP was put into effect, petitioner Quality Professional Nursing ("QPN") saw its roster of some 130 nurses plummet to 20-30 nurses; petitioner Critical Health Care's ("CHC") roster fell from approximately 30 nurses to zero; and petitioner A Complete Health Service's ("A Complete") nursing shifts booked at county hospitals fell from a pre-PPP average of about 50 shifts per month to less than 5. Other non-Preferred agencies suffered similar fates.

even during peak winter months. The PPP not only devastated the boycotted agencies, but became a short-term losing proposition even for the Preferred agencies.

The lock-in of Preferred agencies' respective price schedules under the PPP enabled the hospitals – not similarly restricted – to raise pay for nurses without competitive increases by the Preferred agencies. The lock-in also enabled those Preferred agencies that had bid higher prices – but within the artificially stabilized price range – to lure nurses alway from lower-priced Preferred agencies. One such lower-priced Preferred agency, American Medical Staffing ("AMS"), seeing its nurses deserting it for higher-paying hospitals, asked the hospitals for permission to raise its prices to the levels of the higher-priced Preferred agencies. Even that request was denied.

A Preferred agency had the right to drop out of the PPP on 30 days notice (the "Escape Clause"). That option was meaningless. Dropping out would be tantamount to being boycotted, because it would lead to the same exodus of hospital nurses that petitioners and respondent High Tech justifiably feared in initially deciding to submit bids.

E. Disposition Of The Case By The District Court Below

In December 1988, petitioners and other boycotted agencies sued the SFHA, the 12 participating hospitals, and the eight Preferred agencies, for violations of federal and Florida antitrust law, including, *inter alia*, claims of *per se* illegal price fixing and group boycott, and,

alternatively, unreasonable restraint of trade under the rule of reason.[8]

Respondents denied wrongdoing and counterclaimed seeking a declaratory judgment that the PPP did not violate antitrust law.[9]

On February 21, 1989, the district court preliminarily enjoined the defendants from operating the PPP, *pendente lite*. Almost **immediately**, agency prices once again began to increase toward competitive equilibrium, as if the lid had been lifted from a boiling cauldron.

On November 13, 1989, the court of appeals vacated the injunction, because the district court failed to conduct an evidentiary hearing. *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535 (11th Cir. 1989).

The action was tried to a jury in early 1995. Over petitioners' objections, the district court issued a verdict form under which every antitrust claim – including claims of *per se* illegal price fixing and group boycott – hinged on whether the agencies had proven that the relevant market was limited to temporary nursing services to hospitals in Palm Beach County. The jury was instructed that if the agencies failed to prove the relevant market, **deliberations should go no further, and the jury**

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[8] Initially, petitioner The PDQ Nurse ("PDQ") filed a separate, parallel action, later consolidated with the main action. Petitioner CHC was added as a party in 1990.

[9] The hospitals also counterclaimed against one of the five petitioners, All Care Nursing Service ("All Care"), under federal and Florida RICO statutes (*inter alia*), for claimed fraudulent practices regarding billings and nurse certifications. No such counterclaims were brought against the other four Petitioners.

was required to find for the hospitals on all antitrust claims.

The jury found against the agencies on the relevant market question and thus never reached any other issues regarding the various antitrust claims.[10] The district court entered judgment in favor of the hospitals and the SFHA, as well as a declaratory judgment that the formation and operation of the PPP was legal, under antitrust law. The agencies timely moved for a new trial and renewed their motions for judgment as a matter of law. Those motions were denied. The agencies then appealed to the court of appeals below, which consolidated the appeals.

F. Disposition Of The Case By The Court Of Appeals

The court of appeals affirmed the district court's disposition of the antitrust claims.[11]

In its opinion, the Eleventh Circuit acknowledged that: (1) it is "undisputed" that "the PPP has some impact on the prices of obtaining temporary nurses" (App. 13) and "may stabilize prices to some degree" (App. 15); (2) under the PPP, Preferred agencies were to be selected jointly by the hospitals on the basis of price and other factors (App. 4); (3) the Preferred agencies were required not to raise their prices for one year (App. 5); and (4) the

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[10] The jury also found against All Care on the RICO counterclaims.

[11] The district court's disposition of the RICO counterclaims against All Care also was affirmed. That disposition, and the court of appeals' discussion of the RICO counterclaims in its opinion, are not before the Supreme Court in this Petition.

PPP arose in the context of a nursing shortage which caused agency price increases (App. 3).

Nonetheless, the court of appeals found no price fixing.

Significantly absent from the appellate court's opinion was any mention of economically and legally significant indisputable facts: (1) the PPP coercively stabilized and capped the Preferred agencies' prices to all participating hospitals; (2) while there was some pricing disparity from one Preferred agency to another, each Preferred agency was obligated to charge **identical** prices to every participating hospital; and (3) many boycotted agencies, including petitioners, were devastated and forced to exit the market. All of these factors reduced competition. All of these factors were a direct and foreseeable result of the PPP's structure and conduct.

The court also misconceived key facts: (1) it inexplicably reversed cause-and-effect by concluding that the higher bid prices had caused the hospitals to jointly impose added costs (discussed above) onto the agencies (App. 5 n. 5), although it is undisputed that those added costs were imposed **before** the bidding; (2) it viewed the "Escape Clause" as highly important in offering a meaningful option for Preferred agencies to thwart price fixing by the hospitals (App. 5-6, 14, 15), but ignored the indisputable evidence that "escaping" would have been futile – tantamount to losing the bidding in the first place – and that even Preferred agencies suffering under the PPP did not seek to "escape" from it; and (3) it incorrectly stated that non-Preferred agencies did "more than a trifling" of business with the hospitals under the PPP (App. 17), when in fact only a few non-Preferred agencies even were able to do any business, and even then only by covertly

subcontracting their few remaining nurses **through Preferred agencies**, with the hospitals continuing to enjoy the price caps to which the Preferred agencies artificially were bound.

The Eleventh Circuit opinion acknowledged that price fixing is *per se* illegal, whether by sellers or by purchasers (App. 13). This acknowledgment, while academically correct, was devoid of any mention of the broad definition of *per se* illegal price fixing (encompassing raising, lowering, fixing, pegging or stabilizing of prices) which this Court recently reiterated in its *per curiam* reversal of the Eleventh Circuit in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (discussed *infra*) – another case in which the Eleventh Circuit egregiously erred by construing price fixing too narrowly, leading it to find in favor of defendants who, as this Court later ruled, were guilty of *per se* illegal antitrust violations. Here, once again, the court of appeals, by construing price fixing far more narrowly than is dictated by this Court, fashioned its own "Escape Clause" for antitrust defendants, holding that "[i]n forming the PPP, the hospitals, among themselves, never agreed to a uniform price, to an acceptable price range, or to a scale for determining prices" (App. 13-14). The Eleventh Circuit simply ignored the fact that the PPP was established for the express purpose, and with the intended effect, to cause each agency's prices to be capped, stabilized and identical for every hospital. Instead, the court erroneously concluded: "But we do not have an agreement to fix prices in this case: no prices were preset for nursing services" (App. 15).

Also strikingly absent from the Eleventh Circuit opinion was acknowledgment that the PPP's impact on

prices resulted from a horizontal combination of competing hospitals. Rather, the appellate court focused almost exclusively on the hospitals' post-contract non-group purchases, and it labeled that conduct "vertical," even though the terms of the purchases were determined by earlier **horizontal** conduct. (App. 15 n. 14.) The court relied on its mischaracterization of the conduct as "vertical" to justify applying the rule of reason.

Paradoxically, the Eleventh Circuit also mischaracterized the PPP as a "joint-buying arrangement" by the hospitals (App. 4), to justify rule-of-reason treatment, even though the hospitals never purchased under the PPP as a group. Once the bidding ended and each Preferred agency was locked into identical fixed-price contracts with each of the participating hospitals, any orders were to be placed by the hospitals acting independently, with no volume assurances. That the PPP was never to be a "group buying arrangement" is underscored by the undisputed fact that each Preferred agency was forced to enter into 12 separate – but identical – contracts with each participating hospital.

Having concluded that the PPP did not constitute price fixing, despite the fact that it was a sham buying cooperative, the court of appeals also determined that the agencies' group boycott claim must be assessed under the rule of reason (App. 16-17), altogether ignoring binding precedent (discussed below) condemning *per se* group boycotts in furtherance of price fixing.

Finally, turning to the rule of reason (App. 17-19), the Eleventh Circuit limited its discussion to the need for proof of the relevant market, and conspicuously ignored dispositive controlling authority summarily condemning

naked horizontal restrictions on pricing under the rule of reason, without proof of the relevant market.

REASONS TO GRANT THIS PETITION

I. PUBLIC ANTITRUST POLICY, THIS COURT'S COMMITMENT TO THE *PER SE* RULE FOR HORIZONTAL COLLUSION, AND AVOIDANCE OF CONFLICTS AMONG CIRCUITS, ALL FAVOR GRANTING THIS PETITION

At least twice this decade – in *Palmer, supra,* and in *FTC v. Superior Court Trial Lawyers Association,* 493 U.S. 411 (1990) – this Court has heeded the call to overturn decisions by federal courts of appeals which had willfully refused to condemn, as *per se* illegal, joint conduct among competitors constituting price fixing. In both instances, the circuit courts, using the rule of reason, were prepared to allow the defendants to escape antitrust liability altogether, for conduct which this Court instead deemed *per se* violative. This Court granted certiorari in those cases out of a strong concern that, otherwise, lower courts would embrace the appellate courts' opinions and further eviscerate our nation's antitrust laws – laws which this Court has termed the "Magna Carta of free enterprise." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972).

To prevent such injustices and underscore the commitment to fostering the goals of antitrust law, this Court in *Superior Court* made clear that the *per se* rule has "the same force and effect as any other statutory commands" and that it is not merely a tool of administrative convenience to be ignored at lower courts' discretion. *Id.,* 493 U.S. at 433. And while this Court has at times adapted

substantive law to provide for rule-of-reason treatment where the *per se* rule previously had overreached, such occasions have been rare – and even then it was this Court, not lower courts, which made that decision.[12]

Here, once again, our free enterprise system and our antitrust laws stand threatened by a precedent certain to spawn more and yet-cleverer schemes for fixing prices. Unchecked, the decision below telegraphs a powerful message to price fixers: concoct a scheme with a modicum of complexity, toss in a few mirrors and some smoke, and courts will cite the Eleventh Circuit's decision below to declare the scheme too novel for *per se* treatment.

In addition, the Eleventh Circuit's refusal to condemn *per se* collaboration among competitors that halted free-market price increases during a time of shortage inherently conflicts with the Seventh Circuit in *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965). There, a complex scheme to "fix[ ] the composition of macaroni products . . . to ward off price competition for durum wheat in short supply by lowering total industry demand to the level of available supply" was found to be illegal *per se* – regardless of whether the participants, competing buyers of durum wheat, set specific prices or had market power (345 F.2d at 426-27). The Seventh Circuit's approach to the issue, which would

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[12] For example, this Court recently excepted **vertical** price fixing in the setting of maximum resale prices, so that it would be assessed under the rule of reason. *State Oil Co. v. Khan*, 522 U.S. 3 (1997). But even so, while the Seventh Circuit below encouraged this Court to make such a change in substantive law, it did **not** arrogate to itself the discretion to make that change.

have yielded a totally different outcome in the instant action, was cited approvingly just this year by the Tenth Circuit in *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998).

The opinion below also creates a significant conflict among circuits concerning the scope of the exception to *per se* illegality established in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and its progeny. In *Law, supra*, 134 F.3d at 1021, the Tenth Circuit construed that exception narrowly, as petitioners herein believe this Court intended, so as to permit rule-of-reason treatment **only** where price fixing is ancillary to achievement of an **otherwise-unattainable** procompetitive goal (usually the very existence of a market); whereas here, the Eleventh Circuit applied *BMI* so cavalierly that it opened a gaping hole which swallows the *per se* rule. (The *BMI* issue is discussed *infra.)*

Finally, as shown *infra*, the opinion below conflicts with Department of Justice and FTC guidelines, which would condemn the PPP as illegal price fixing, *per se*.

II. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF HORIZONTAL PRICE FIXING MUST BE OVERTURNED

The court of appeals below, in assessing the agencies' price-fixing claims, has committed four fundamental blunders, each warranting the granting of this petition.

A. The Standard For Price Fixing Was Misconstrued

Here, as in *Palmer*, the Eleventh Circuit plainly misconceived the scope of proscribed price fixing, even

though it has long been held to broadly encompass contracts, combinations or conspiracies which raise, lower, fix, peg or stabilize prices. *Palmer, supra*, 498 U.S. at 48; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The appellate court erred by misconstruing that breadth. Instead, it found no price fixing here because "[i]n forming the PPP, the hospitals, among themselves, never agreed to a uniform price, to an acceptable price range, or to a scale for determining bids." (App. 13-14.) But the undisputed record showed, in contrast, that under the PPP the hospitals in fact **did agree** on price ranges, by jointly deciding: (1) to accept some bids and to reject others; (2) to eliminate agencies on the basis of prices bid; (3) to demand re-bids; (4) to require that each Preferred agency freeze its prices for a year; (5) to demand that each Preferred agency give identical prices to every hospital; (6) to impose added costs onto the agencies; and (7) to restrict **themselves and each other** to using **only** Preferred agencies absent exigent circumstances.

The Eleventh Circuit's narrow interpretation of the price-fixing proscription, and its refusal to condemn the PPP as price fixing despite admissions from key SFHA and hospital personnel that it was formed to stabilize prices, reflect the very same misguided view of price fixing which led to this Court's *per curiam* reversal of the Eleventh Circuit in *Palmer*.

Less than a decade ago, in *Palmer*, the Eleventh Circuit refused to apply the *per se* rule because the challenged agreement did not directly address pricing and was "not a classic form of price fixing where two competitors agreed what price they would charge for their products." *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1424

(11th Cir. 1989). There, as here, the lower court elevated form over substance of the illegal conduct; and, finding the form unusual, the court felt free to ignore the *per se* rule. This Court could not have been clearer in its reversal in *Palmer*, based just on the certiorari petition: horizontal tampering with free-market pricing mechanisms is *per se* illegal, whether its form is garden-variety or imaginative.

Yet here, the Eleventh Circuit again commits the very same error. *Deja vu*: it ignores the substance of the PPP, through which competing hospitals consciously sought to suppress competition from the agencies, and thereby halt or minimize further price increases during a shortage of nurses – when the free market dictates competitive price increases as the antidote for solving that shortage.

What captivated the Eleventh Circuit, and led to its error below, was that the hospitals did not actually "set" the prices; they merely established the mechanism by which suppliers' prices would be forcibly capped, stabilized, and made uniformly available to every participating hospital – a result that the respondent hospitals had found themselves unable to achieve, individually. Thus, the Eleventh Circuit here followed the same narrow approach to defining price fixing as it did in *Palmer*.

However, it is well-settled that price fixing agreements need not be direct, but rather may be tacit and indirect. *See, e.g.*: *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (condemning complex "Open Competition Plan" which restrained competition and led to higher prices); *United States v. Linseed Oil Co.*, 262 U.S. 371 (1923). *See also United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956) (it "makes no difference

whether the price fixing is accomplished by express contract **or by some more subtle means** [emphasis added]"). Indeed, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), this Court condemned, as *per se* illegal price fixing, a horizontal agreement to refuse to give credits – even though no actual prices, or price ranges, had been agreed upon.

To the same effect is *Socony-Vacuum, supra*, condemning indirect price fixing among competing buyers, which agreed to buy up surplus gasoline in order to prop up and stabilize selling prices. There, this Court stressed:

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. . . . An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices **whatever machinery for price-fixing was used**.

Id. at 222; emphasis added.[13]

Here, common sense, bolstered by well-settled case law, dictates that there should be no different treatment even though the hospitals did not themselves explicitly "set" the prices or price ranges bid by the agencies. The PPP itself was born of the hospitals' desire to contain

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[13] For an extensive listing of some 19 different forms of horizontal price fixing which courts have condemned – "some of which do not at first blush appear to affect price" – *see* 2 J. O. Von Kalinowski *Antitrust Laws and Trade Regulation* § 6A.03[1] (1992), at pages 6A-11-15. The wide variety makes readily apparent both that such agreements need not directly set prices, and that the **forms** through which free-market pricing is tampered with are limited only by the imagination of the tortfeasors.

prices, as the quotations above from SFHA personnel graphically attest. Having implemented the Program, all the hospitals had to do was sit back and watch as the agencies, fearing exclusion, were coerced into submitting "bids" reflecting lower profit margins for the agencies – a result which, as shown above, no hospital could have achieved without collaboration with competing hospitals. In sum, the PPP amounts to blatant horizontal price fixing.[14]

B. The *"BMI"* Exception To *Per Se* Illegality Was Misconstrued

The court below misapplied *BMI, supra,* by stretching it so wide as to make the exception swallow the rule.

Once conduct is determined to qualify as price fixing – a finding which should have been made here – it can escape *per se* condemnation only in exceedingly narrow circumstances. In *BMI,* this Court permitted such a departure because some price fixing was essential to the existence of a "blanket license." *Id.*, 441 U.S. at 21-22.

Likewise, in *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984), this Court again departed

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[14] The Eleventh Circuit also placed heavy and repeated emphasis on the so-called "Escape Clause" under which a Preferred agency could drop out of the PPP on 30 days notice (App. 5-6, 14, 15) – as if that clause, by itself, somehow altered the coercive price-fixing nature of the PPP. However, the "Escape Clause" was, at best, illusory: dropping out of the PPP would have been tantamount to losing the bidding in the first place; would have proved disastrous for the agency; and would have resulted in the loss of its hospital nurses. That is why, despite the fact that the PPP also injured the Preferred agencies (discussed *supra*), no Preferred agency ever exercised the "Escape Clause."

from the *per se* rule because "horizontal restraints competition are essential if the product is to be available at all." *Id.*, 468 U.S. at 101.

Here, in contrast, the Eleventh Circuit has repeatedly invoked *BMI* **not** for its narrowness, but instead as purported precedent for exempting almost any price-fixing scheme. (App. 13, 14.) In so doing, the Eleventh Circuit ignores this Court's rigid requirements in *BMI* and *NCAA* for escaping the *per se* rule and creates an inter-circuit conflict (discussed *supra*), while simultaneously ignoring its own precedent.[15]

Moreover, the Eleventh Circuit's opinion is devoid of any proper "procompetitive" basis for allowing the PPP to escape *per se* treatment – much less a showing that it was essential for the hospitals to combine to create some new product, **or** that price fixing was needed for there to be a market at all, **or** even that an otherwise unattainable procompetitive benefit existed to which the price-fixing features of the PPP were ancillary.[16]

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[15] In *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986), the Eleventh Circuit recognized the narrowness of the *BMI* exception, holding that it applies only where the restraint "is no greater than reasonably necessary to achieve a legitimate commercial objective" and is ancillary to and counterbalanced by "otherwise unattainable procompetitive benefits." (*Id.* at 601.) Here, such an evidentiary showing was not made by respondents and was not even considered by the appellate court.

[16] The hospitals may have had some legitimate quality concerns about particular agencies or nurses. Individual hospitals already had "do not use" nurse lists; thus a less restrictive alternative already existed. More importantly, the hospitals plainly **could** have met for the narrow purpose of addressing shared quality concerns **without seeking to cap and**

Price increases arising from competitive forces in times of shortage are never welcomed by buyers, and may cause budgetary inconvenience. Nevertheless, "the statutory policy underlying the Sherman Act 'precludes inquiry into the question whether competition is good or bad.' " *Superior Court, supra,* 493 U.S. at 424. Moreover, while in *BMI* and *NCAA* this court found that the industries at issue had unique attributes necessitating price fixing, it is also settled that no such justification automatically arises for health care (*Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982)) or professions (*Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975)).

C. The Court Below Deemed Horizontal Conduct To Be Vertical

The Eleventh Circuit's opinion below (App. 15 n. 14) also threatens to undermine this Court's precedents and the *per se* rule by mischaracterizing the PPP as vertical, so as to justify rule-of-reason treatment, when in truth and in substance the PPP was purely horizontal. As the Eleventh Circuit saw it, because the hospitals did not themselves dictate the Preferred agencies' prices, their horizontal combination is somehow irrelevant, and the focus must be on the vertical conduct of purchasing that followed the horizontal establishment and forced implementation of the PPP. Such an approach guts the *per se* rule against horizontal price fixing: every price fixing agreement among competitors, no matter how direct, is entered into for the purpose of impacting the conspirators' subsequent selling prices or purchasing prices – *i.e.*, in either case, the conspiracy, while formed horizontally,

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stabilize prices, and without jointly boycotting agencies. The Eleventh Circuit simply ignores this critical issue.

is designed to affect the conspirators' **vertical** relationships.[17]

D. The PPP Was Not An Instance Of Procompetitive Group Buying

The Eleventh Circuit casually referred to the PPP as an example of group buying (App. 4), another flawed basis to justify its rule-of-reason treatment. As this Court recognized in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985), group buying cooperatives enable smaller buyers to aggregate their purchase volumes and thereby obtain discounts available on the open market to larger competitors. Here, by contrast, there was no "group buying," no aggregation of purchasing volumes (no volume assurances), and no "procompetitive" need for the hospitals to combine to match lower agency prices being obtained by other buyers (there were no other buyers getting lower prices). Rather, once the hospitals jointly established the PPP and coerced each Preferred agency to enter into identical contracts with each hospital fixing the terms for later purchases, actual buying, if any, was conducted strictly on a one-to-one basis between a participating hospital and any Preferred agency it might call.[18]

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[17] *Cf. Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 n. 4 (1988): "[A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' agreement among his distributors is in reality a horizontal restraint."

[18] Thus, the PPP also runs afoul of the Department of Justice and FTC's joint "Statements of Antitrust Enforcement in Health Care" of August, 1996, 4 Trade Reg. Rep. (CCH) ¶ 13,153, which provide (at p. 20,812 n. 17): "An agreement among

III. THE ELEVENTH CIRCUIT'S FUNDAMENTAL MISCONCEPTIONS OF *PER SE* ILLEGAL GROUP BOYCOTTS MUST BE OVERTURNED

The Eleventh Circuit's fundamental mistreatment of petitioners' price-fixing claims also led it to rule that the PPP was not a *per se* illegal group boycott, contrary to binding precedent from this Court. (App. 16-17.) The hospitals' joint conduct in excluding all but a handful of agencies from the PPP obviously was a boycott, relegating the losers to last-resort status and causing their hospital nurses to flee, resulting in the closure of agencies, including petitioners. Because the PPP was a boycott in furtherance of horizontal price fixing, it must be condemned *per se*. Inquiry into relevant market and market power issues its superfluous and irrelevant; it stands the *per se* rule on its head.

This outcome is mandated under *Superior Court*, *supra*, where this Court reversed the District of Columbia Circuit for its comparable refusal to apply the *per se* rule. Yet the Eleventh Circuit, in its discussion of group boycott issues, never even once mentions *Superior Court*. Instead, the court cited repeatedly to *Northwest Wholesale*, *supra*, to justify rule-of-reason treatment for the PPP. However, this Court made crystal clear in *Superior Court* (493 U.S. at 436 n. 19) that group boycotts with horizontal price-fixing features are *per se* illegal, and cases cited by the dissent – including *Northwest Wholesale* – were expressly deemed inapplicable. For the Eleventh Circuit to ignore this Court's decisions is inexplicable.

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purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product is not a legitimate joint purchasing arrangement and is a per se violation."

IV. THE PPP SHOULD BE SUMMARILY CONDEMNED EVEN UNDER THE RULE OF REASON

The Eleventh Circuit also, in fashioning its opinion (App. 17-19), ignored precedent from this Court holding that horizontal arrangements which constitute naked restraints on price are to be condemned without any showing of market power within a relevant market, even under the rule of reason. In *NCAA*, *supra*, a rule-of-reason case, this Court flatly stated:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." . . . **We have never required proof of market power in such a case.** This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110; emphasis added. Here, the PPP – implemented to cap and stabilize prices – was nothing more than a "naked restriction" on prices and merits summary condemnation.

Lastly, the Program not only eliminated many agencies from the market, but also, by suppressing competition for nurses among the hospitals and agencies,

ironically threatened to reduce aggregate nurse "output" and exacerbate the very nursing shortage that gave rise to the spiraling agency prices in the first place. As such, the PPP also merits summary condemnation under the rule of reason, without determination of relevant market and market power issues, under *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (" 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power").

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
TABLE OF CONTENTS

Page

Eleventh Circuit Opinion, filed February 18, 1998 ..... App. 1

District Court Judgment, filed May 3, 1995..... App. 21

District Court Omnibus Order on Post-trial Motions, dated August 25, 1995..... App. 29

Eleventh Circuit Order, filed May 18, 1998, partly granting and partly denying petitions for rehearing..... App. 51

Eleventh Circuit Order, filed September 18, 1998, denying petition for rehearing ..... App. 54

IN THE UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC., BENSON HEALTH CARE SERVICES, INC., et. al.,

Plaintiffs-Appellees,

versus

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant.

No. 95-5218

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,

Plaintiff-Appellant,

A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING, INC., et al.,

Plaintiffs-Appellants,

JULIE MONAHAN,

Counter-Defendant-Appellant,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
NME HOSPITALS, INC., et. al.,

Defendants-Appellees,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(Filed February 18, 1998)

Before EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Two separate actions (with different plaintiffs) against the same defendants for alleged antitrust violations have been consolidated and are treated as one appeal. Plaintiffs appeal a jury verdict for defendants on antitrust claims. They also appeal the jury verdict against them on counterclaims for state and federal RICO violations. Many issues were raised on appeal. But we conclude that most of the challenges obviously lack merit, and we do not discuss them in this opinion. We do discuss a couple of issues in some detail, and we affirm the district courts' judgments.

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge Sixth Circuit, sitting by designation.

Background

Beginning in the mid-1980's the United States experienced a severe nursing shortage. Southern Florida was hit especially hard due to its increased demand for nurses in winter months to accommodate the high influx of people to the area at that time of year. This shortage, along with other market considerations, caused an increase in prices for nursing services and a difficulty in staffing hospitals (and other facilities) with sufficiently licensed nurses.[1]

Hospitals use full or part-time hospital nurses, contract nurses (nurses hired for a specified period of time), travel nurses (contract nurses hired from different areas of the country), and temporary nurses (nurses employed by agencies and hired by hospitals for a shift at a time).[2] Temporary nursing agencies send their nurses to hospitals, nursing homes, clinics, doctors' offices, and patients' homes. They have the choice to provide services for any facility or person in need of such care. They are not limited to providing nurses to hospitals.

During the pertinent period, hospitals were faced with quality concerns, as well as rising prices. No efficient means existed to share information with other hospitals about agency nurses. This lack of information resulted in problems with some agencies, including plaintiff-appellant All Care Nursing Services, Inc. ("All

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[1] Nurse qualifications fall into at least three different licensing categories: Registered Nurse (RN), Licensed Practical Nurse (LPN), and Certified Nursing Assistant (CNA).

[2] These temporary nursing agencies are also providers of travel and contract nurses to hospitals.

Care").[3] These problems included "phantom booking" – where a hospital requests a specific nurse with whom it has dealt in the past, only to be sent a different nurse; "blind booking" – where a hospital sets up to receive the services of a nurse from an agency only to have the agency cancel at the last minute; fraudulent billing – billing hospitals for services of an RN when actually a less qualified LPN or CNA performed the services; cheating on certification exams; and altering certification documents.

In response to the problems the South Florida Hospital Association ("SFHA") approached hospitals in Palm Beach County about a potential purchasing arrangement. In 1988, twelve (12) Palm Beach County hospitals set up an arrangement whereby they would solicit bids from temporary nursing agencies and would then select agencies to be preferred providers of such services, the Preferred Provider Program ("PPP"). The selection of the preferred agencies was to be made based upon competence, services provided, quality, and bid price. Under this joint-buying arrangement all the participating hospitals agreed to seek first nurses from preferred providers before going to nonpreferred agencies for nurses on each occasion.

All agencies were invited, either by letter or by advertisement in the Palm Beach newspaper (*Palm Beach*

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[3] The problems described formed the basis of the counterclaim against All Care and Monahan for federal and state RICO violations.

Post), to participate in the bidding. Sixteen (16) agencies presented bids and eight (8) were selected as preferred.[4]

In November 1988, the PPP began operation. Each hospital entered into individual contracts with each of the preferred agencies. All the agencies selected as preferred providers were required to agree to things like treating their nurses as employees by providing workers' compensation, paying taxes, and providing necessary insurance. Before the PPP, agencies had treated their nurses as independent contractors, not employees; and the higher costs associated with unprotected workers were borne by the hospitals.[5]

The preferred agencies did not contract with the hospitals at the same prices, but instead at the prices that each particular agency had bid. Agencies were also required to agree in the contracts not to change their prices for one year – the length of each contract – and, thus, were somewhat tied into their bid prices. But to

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[4] Some of the appellant agencies participated in the bidding process, others did not. Following the submission of the initial bids four (4) agencies were eliminated based on their bid prices, which in some instances were 50% higher than other agencies' bids. The remaining twelve (12) rebid and were considered using the established criteria. Which agencies actually resubmitted bids is unclear. But, all of the accepted agencies bid prices higher than the price ranges suggested by the SFHA in its invitation to bid. None of the appellants was selected as preferred providers.

[5] The hospitals felt the need to place some of the financial burden on the agencies because after the bidding, agency services were actually costing more than before the PPP. These contract provisions were a way to shift some of the cost back to the agencies.

allow for shifts due to market changes, each agency could terminate its contract with a particular hospital upon 30 days notice (the "escape clause").

After the creation of the PPP, plaintiffs-appellants filed suit against the participating hospitals, preferred agencies, and the SFHA[6] alleging antitrust violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and under Florida Statutes §§ 542.18 and 542.19. Defendants then filed a counterclaim against All Care, and its operator Monahan, for violations of federal and state RICO statutes by billing fraudulently, aiding cheating on certification exams, and aiding persons to obtain false certification.[7]

Awaiting trial, plaintiffs-appellants sought and received a preliminary injunction, which halted implementation of the PPP. That preliminary injunction, however, was vacated by this court because of the district court's failure to hold the necessary evidentiary hearing. *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535 (11th Cir. 1989). The request for an injunction was never reinstated.

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[6] Plaintiffs-appellants include: All Care Nursing Services, Inc.; A Complete Health Care Services, Inc.; Benson's Health Care Services, Inc.; Critical Health Care, Inc.; Quality Professional Nursing of Florida, Inc.; and P.D.Q. Nurse, Inc.

Defendants-appellees include the SFHA, twelve (12) Palm Beach County hospitals, and four (4) remaining agency defendants (four (4) agencies settled with plaintiffs before final disposition in the district court).

[7] Claims of fraud, civil theft, and false representation against All Care and Monahan were dismissed before trial.

After a four-week jury trial, a verdict was entered in favor of defendants on all relevant claims. Plaintiffs filed motions for new trial, for judgment as a matter of law, and for amendment of the pleadings to conform with the evidence. All these motions were denied by the district court; and we now affirm those denials.[8] Plaintiffs-appellants also appeal the antitrust and RICO counterclaim verdicts against them; but we affirm those judgments, too.

Discussion

I. Federal and State RICO Claims

Plaintiffs-appellants All Care and Monahan argue that the Florida and Federal RICO claims against them are barred by the economic-loss rule. That rule provides that "parties to a contract can only seek tort damages if conduct occurs that establishes a tort distinguishable from or independent of [the] breach of contract." *Jones v. Childers*, 18 F.3d 899, 904 (11th Cir. 1994) (citations and quotations omitted). The rule is based upon the idea that "contract principles are more appropriate than tort principles for resolving economic loss claims." *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 901 (Fla. 1987).

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[8] Also affirmed is the district court's decision in the bench trial of Defendant High Tech's Lanham Act counterclaim.

Neither All Care nor Monahan can use the economic-loss rule to escape liability under the federal RICO statutes.[9] We have already ruled that Florida's economic-loss rule does not bar a plaintiff from "bringing a [federal] RICO action where a breach of contract claim also exists . . . . many RICO cases involve contract disputes." *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991).

About the state RICO claims, Florida's RICO statutes have consistently been interpreted using federal RICO claims cases. No reason has been presented to us to justify applying the economic-loss rule differently to RICO claims made under state and federal RICO statutes.[10] Thus, the economic-loss rule does not bar these claims.

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[9] Defendants argue that Monahan cannot be afforded the benefit of the economic-loss rule because she, individually, entered into no contract with the defendant hospitals: she lacked privity of contract. All contracts were between her agency, All Care, and the hospitals. Because we conclude that the economic-loss rule does not bar RICO claims, state or federal, we need not decide this question. But, the Florida Supreme Court has held, at least under one set of facts, that privity is not required for the economic-loss rule to apply. *See Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993); *see also Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 40 F.3d 1198, 1200 (11th Cir. 1994) (where this court applied *Casa Clara* to make "meritless" a claim that the rule does not bar tort claims between parties who lack contractual privity).

[10] Plaintiffs-appellants also challenged the RICO counterclaims on another ground: that reliance on the alleged misrepresentations made by All Care and Monahan was not proved by defendants. Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was

II. Antitrust Claims

Plaintiffs-appellants argue that the formation and operation of the Palm Beach County PPP is a violation of the antitrust laws of the Sherman Act and Florida Statutes §§ 542.18 and 542.19,[11] prohibiting restraints on trade. The Sherman Act, in relevant part, sets out these rules:

> Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
>
> Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or

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injured by reason of the RICO defendant's deception and fraud. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). But, no argument is made by the plaintiffs-appellants that injury was inadequately shown. So, lack of reliance does not require reversal on this claim.

[11] Federal and Florida antitrust laws are analyzed under the same rules and case law. Fla. Stat. § 542.32 ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); *see also St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1032 (Fla. Dist. Ct. App. 1984) ("[T]he Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act."); Fla. Stat. §§ 542.16 (Florida antitrust laws complement federal antitrust laws), 542.18 (analogous to § 1 of the Sherman Act). So, for purposes of this opinion discussion of the law under the Sherman Act is equally applicable to the plaintiffs-appellants' state antitrust claims.

> conspire . . . to monopolize . . . shall be deemed guilty of a felony.

15 U.S.C. § 1; 15 U.S.C. § 2.

Despite the expansive language of the statute, the Supreme Court has interpreted this statute to prohibit only "unreasonable" restraints on trade. "A restraint may be violative of the Sherman Act because it is solely a naked restraint of trade so offensive to competition as to be unreasonable per se, or because it runs afoul of the more detailed rule of reason inquiry." *Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1380 (11th Cir. 1997).

Some acts have been said to be so facially anticompetitive that by their very nature they are deemed unreasonable and, thus, per se violative of antitrust laws. These "practices are 'so plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason. . . . " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7-8, 99 S.Ct. 1551, 1556 (1979) (internal citations omitted) ("*BMI*"). Price fixing, horizontal market divisions, tying arrangements, and group boycotts have emerged as practices that are generally illegal per se. *See National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 598 (11th Cir. 1986) (citing *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 [1960]); *State Oil Co. v. Khan*, 118 S.Ct. 275 (1997); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

"But easy labels do not always supply ready answers." *BMI*, 441 U.S. at 8, 99 S.Ct. at 1556. Since the emergence of these per se categories, we have stressed that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition." *National Bancard Corp.*, 779 F.2d at 598 (citation and quotation omitted). The Supreme Court, as well, has refused to force various practices into "pigeonhole[s] and [to invoke] the per se rule." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 2018 (1986).

A "rule of reason" is generally applied to determine what acts are permissible. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911). Thus, a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed per se unreasonable. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 726 (1988). But, there are no bright lines. "The decision to apply the per se rule [instead of the rule of reason] turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289-90, 105 S.Ct. 2613, 2617 (1985).

In *Northwest*, the Supreme Court observed that what activities might fall into a per se category is "far from certain." *Id.* at 294, 105 S.Ct. at 2619. Considerable inquiry into the market conditions and market power of the

defendant is often necessary before conduct can be presumed to be anticompetitive. *Id.* at 296, 105 S.Ct. at 2620-21 (addressing group boycotts).

Plaintiffs-appellants claim that the PPP's arrangement is per se illegal as both price fixing and as a group boycott. Thus, plaintiffs-appellants have the burden to make a threshold showing that the PPP falls into one of these forbidden categories. *See Id.* [sic] at 298, 105 S.Ct. at 2621. In this case, plaintiffs-appellants allege that, because price bids were a consideration in determining which temporary nurse agencies would become preferred providers, this conduct falls into the forbidden category of price fixing. They also claim that the exclusion of the nonpreferred agencies from the PPP amounts to a group boycott.

The decision whether the PPP established by defendants-appellees amounts to either a price fix or a group boycott, deserving of per se treatment, determines the antitrust issue on appeal.[12]

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[12] If we decide the PPP is deserving of per se treatment the case ends; plaintiffs-appellants must win. But if we decide that conduct such as the establishment of the PPP does not rise to the level of anticompetitiveness necessary to hold it per se illegal, the rule of reason applies; and we will defer to the determination of the jury – that plaintiffs-appellants failed to establish the relevant market in which to judge the PPP's reasonableness.

A. Per se Violations

1. Price Fixing

That the PPP has some impact on the prices of obtaining temporary nurses is undisputed. That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is also undisputed. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 68 S.Ct. 996, 1005-06 (1948). And, it is no excuse that the price "fixed" is reasonable. *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S.Ct. 768, 775 (1990). But whether the per se rule should apply "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' " *BMI*, 441 U.S. at 9, 99 S.Ct. at 1556-57.

Plaintiffs-appellants argue that the intent of the PPP was to stabilize prices and that such intent makes this practice a per se violation. But anticompetitive effects – not intent – is the focal point of antitrust legislation. The question is not did defendants intend to fix prices, but instead whether the PPP did so. In defining "price fixing" the Supreme Court wrote in these terms:

> That price-fixing includes more than the mere establishment of uniform prices is clearly evident. . . . [P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform. . . . They are fixed because they are agreed upon.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23 (1940). In forming the PPP, the hospitals, among

themselves, never agreed to a uniform price, to an acceptable price range,[13] or to a scale for determining price.

The PPP has an impact on price; all preferred agencies contracting with the hospitals will, to some degree, be tied into a set price for their services. But this point of law must be remembered: "Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *BMI*, 441 U.S. at 23, 99 S.Ct. at 1564. And, it cannot be forgotten that market fluctuations could result in a preferred agency's exercise of the escape clause – allowing that agency to reenter the market free to charge the prices it chooses. Most important, this case involves lots of distinct contracts. A pricing agreement of some kind is necessary in the contracting for goods and services; and competitive bidding is an acceptable way to decide with whom the hospitals wish to contract.

Earlier Supreme Court cases were faced with more direct price fixing, which led to the per se categorization of such schemes. In the context of a blatant agreement to fix prices,

> [i]t makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large

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[13] That the SFHA – when it requested bids – suggested a price range to the participating agencies does not create an agreement on the prices they would accept. As shown by the accepted bids, prices outside the range were acceptable.

> or small; or whether the effect of the agreement is to raise or to decrease prices.

United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956). But we do not have an agreement to fix prices in this case: no prices were preset for nursing services.

The Supreme Court has recently taken another step away from per se treatment, particularly in vertical price fixing arrangements.[14] *See State Oil Co. v. Khan*, 118 S.Ct. 275 (1997). Vertical price fixing is no longer a per se violation. *Id.* at 278.

The key to per se treatment is whether the conduct is of the kind that can only be anticompetitive. But, the PPP, arranged by the SFHA and the Palm Beach County hospitals, is not inherently an anticompetitive practice. No temporary nursing agency was precluded from competing to become a preferred agency. Also, all agencies are still able to provide nurses to medical facilities other than hospitals and even to hospitals should the need for nurses not be met by the preferred agencies. Although the PPP may stabilize prices to some degree, it is not the kind of "stabilization" that can be viewed as price fixing, especially when the escape clauses in the contracts are taken into account. These escape clauses allow the market and not the SFHA to be the ultimate decisionmaker for each hospital and each agency on the issues of price, demand, supply, and terms of dealing.

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[14] The alleged attempt to fix prices by the hospitals' agreement with each other would be horizontal – an agreement among competitors. The alleged attempt to fix prices by the hospitals' agreements with the preferred agencies would be vertical and is not per se illegal after *State Oil Co. v. Kahn*.

2. Group Boycotts

The same principles apply to a consideration of application of the per se rule whether the act complained of is labeled price fixing or a group boycott. "[T]he recent jurisprudence of the Supreme Court and of the Court of Appeals of this Circuit cautions against the haphazard expansion of the 'group boycott label' and the concomitant imposition of per se liability." *Retina Assocs.*, 105 F.3d at 1381. "Not all concerted refusals to deal are predominantly anticompetitive." *Northwest*, 472 U.S. at 298, 105 S.Ct. at 2621. In cases of group boycotts where the per se rule has been applied, "the boycott often cut[s] off access to a supply, facility, or market *necessary to enable the boycotted firm to compete*, . . . and frequently the boycotting firms possessed a *dominant position in the relevant market.*" *Id.* at 294, 105 S.Ct. at 2619 (emphasis added).

In dealing with group boycott situations, market analysis has found its way into the determination of whether a given practice should be per se illegal. No longer is relevant market a factor only after it has been decided that the rule of reason applies. "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that [the conduct] is virtually always likely to have an anticompetitive effect is not warranted." *Northwest*, 472 U.S. at 296.

In this case, no refusal to deal has been shown. All agencies were able to participate in the bidding to become preferred providers, and generally a hospital will still deal with any nursing agency when the preferred

agencies with which the hospital has contracted for nursing services fail to meet its needs. The record shows, in fact, that more than a trifling portion of hospital nursing business in Palm Beach County continued to go to nonpreferred agencies after the PPP was in operation. Also, due to the rise in HMOs, home care, and similar trends in the medical world, facilities other than hospitals provide the market, the supply, and the facilities necessary for nonpreferred agencies to compete with each other and with preferred agencies in the marketplace.

Per se treatment has been given to those practices which history has shown have only anticompetitive effects. "[A]nalyzing this case under the per se rubric would remain inappropriate absent some demonstration that the practice at issue historically leads to anticompetitive effects in the market." *Retina Assocs.*, 105 F.3d at 1381. No history of this kind seems to exist for health-care preferred-provider programs materially similar to what we have before us now.

We conclude, based upon undisputed facts, that the practice of this PPP is not deserving of per se treatment and was properly evaluated under the rule of reason.

B. Rule of Reason

The rule of reason requires "the factfinder [to weigh] all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The rule of reason should be applied to practices designed to "increase economic efficiency or render markets more,

rather than less, competitive." *BMI*, 441 U.S. at 19-20; *see also Northwest*, 472 U.S. at 289-90.

"[T]o satisfy the rule of reason, the plaintiff must prove that the [conduct] had an adverse effect on competition." *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1392 (10th Cir. 1992). But, competition occurs only in a market. Thus, "before we can reach the larger question of whether [defendants] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991).[15]

Interrogatories went to the jury.[16] The jury found that plaintiffs-appellants failed to establish the relevant market. Because no definable market was proved, plaintiffs could show no adverse effect on competition. Plaintiffs-appellants try to debate the required showing of market power. But their argument is based upon per se treatment of the antitrust claim. Because we have decided, as did the district court, that the PPP triggers no per se analysis, relevant market was critical to plaintiffs-appellants' claims.

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[15] Because this case is subject to the rule of reason and because of the importance of relevant market and market power in evaluating the reasonableness of a purported restraint, the district court's jury instructions and interrogatories directing that the jurors must find for defendants if plaintiffs failed to establish the relevant market were proper applications of the law governing this case.

[16] The interrogatories, among other things, directed the jury to find for the defendants if the plaintiffs did not establish the necessary relevant market.

The jury found that no relevant market was shown; and we will reverse the jury's determination on this factual issue only if it is clearly erroneous. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 381, 76 S.Ct. 994, 999 (1956). We cannot say the finding that no relevant market was established is clearly erroneous. The failure to establish the relevant market (either by product or geography) was fatal to plaintiffs-appellants' antitrust claims. So, we accept the jury verdict against them.

AFFIRMED.

WELLFORD, Senior Circuit Judge, concurring:

I concur in Judge Edmondson's opinion. The antitrust issues were addressed early in this case through a decision on setting aside a preliminary injunction in and expanded on in a concurring opinion authored by then Chief Judge Tjoflat, 887 F.2d 1535, 1539 (11th Cir. 1989) (Tjoflat, C.J., concurring).

There were contested issues as to whether defendants possessed market power in a relevant market for temporary nursing services. The jury decided the contested relevant issue on which plaintiffs had the burden. There were contested issues as to whether defendants had monopoly "control over access to an essential element of competition" by means of the arrangement. Plaintiffs had the burden to prove this and they failed in this burden.

Judge Edmondson points out, as Judge Tjoflat previously did in this case, that *Northwest Wholesale Stationers,*

Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985), is key, and it "prohibits the application of the per se rule to cooperative buying arrangements unless a court has made certain preliminary findings of fact." *Id. Northwest* held that "[a]bsent a showing [of market power or *exclusive access* to an element essential to effective competition] with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Northwest*, 472 U.S. at 297, *quoted in All Care Nursing Service*, 887 F.2d at 1539; *see also* Areeda & Havenkamp, *Antitrust Law* (1989 Supp.) ¶ 1511 (discussing *Northwest* and suggesting that plaintiffs must establish market power of defendant before the court should finally decide *per se* or rule of reason application).

In addition, this circuit has indicated that "[t]he presumption in cases brought under section 1 of the Sherman Act is that the rule-of-reason standard applies." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991). We observed in that case, moreover, that "[t]he Supreme Court has made it clear that the per se label should be applied infrequently and with caution." *Id.*

The majority opinion has covered all of the questions in this case; I merely emphasize the application of the rule-of-reason principle under the circumstances.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ALL CARE NURSING SERVICE, INC., A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING OF FLORIDA, INC., AND CRITICAL HEALTH CARE, INC.

Plaintiffs,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., AND HIGH TECH STAFFING SERVICES, INC.,

Defendants.

CASE NO. 88-8568-CIV-PAINE

CASE NO. 88-8572-CIV-PAINE
(Consolidated)

THE PDQ NURSE, INC.

Plaintiff,

v.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER,

BOCA RATON COMMUNITY HOSPITAL, INC. AND HIGH TECH STAFFING SERVICES,

Defendants.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, AND BOCA RATON COMMUNITY HOSPITAL, INC.

Counterclaimants,

v.

ALL CARE NURSING SERVICE, INC., A COMPLETE HEALTH SERVICE, INC., QUALITY PROFESSIONAL NURSING OF FLORIDA, INC., THE P.D.Q. NURSE, INC., CRITICAL HEALTH CARE, INC. AND JULIE MONAHAN,

Counter-Defendants.

HIGH TECH STAFFING SERVICES, INC.

Counterclaimant,

v.

ALL CARE NURSING SERVICE, INC., JULIE MONAHAN, THE P.D.Q. NURSE, INC. AND DONNA DAVIS-TAUREL,

Counter-Defendants.

_____/

JUDGMENT IN A CIVIL CASE

(Filed May 3, 1995)

These consolidated actions came before the Court for a jury trial on February 27, 1995 and for concurrent resolution of non-jury claims. On March 27, 1995, the jury rendered its verdict in the form of special interrogatories. On April 14, 1995, this court entered an order in favor of the Counterdefendants on High Tech's Lanham Act claim. In accordance with the jury's verdict and the orders of this court previously entered it is hereby

ORDERED and ADJUDGED that final judgment is entered as follows:

a. In favor of all Defendants and against all Plaintiffs on the Amended Complaint of All Care Nursing Service, Inc., A Complete Health Service, Inc., Quality Professional Nursing of Florida Inc., and Critical Health Care, Inc. and all claims stated therein are dismissed with prejudice;

b. In favor of all Defendants and against all Plaintiffs on the Petition for Injunctive Relief and Amended Complaint for Damages of The P.D.Q. Nurse, Inc. and all claims stated therein are dismissed with prejudice;

c. In favor of Defendants Bethesda Memorial Hospital, Inc., Jupiter Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., Wellington Regional Medical Center, Inc., NME Hospitals, Inc. d/b/a West Boca Medical Center, Pinecrest Rehabilitation Center, Boca Raton Community Hospital, Inc., and South Florida Hospital Association, Inc. and against all Plaintiffs on Count I of the Corrected

Amended Counterclaims for Declaratory Judgment, *to wit*, neither the Preferred Provider Program as implemented by Defendants nor Defendants' participation therein violated state or federal antitrust law (Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, or Florida Statute §§ 542.18, 542.19);

d. In favor of Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., and Pinecrest Rehabilitation Center on Counts II (Fraud) and III (Civil Theft) of the Corrected Amended Counterclaims, and those claims are dismissed with prejudice;

e. In favor of Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., and Pinecrest Rehabilitation Center on Count IV (Lanham Act) of the Corrected Amended Counterclaims, and those claims are dismissed with prejudice;

f. In favor of Counter-Defendants all Care Nursing Service, Inc. and Julie Monahan and against Counterclaimants South Florida Hospital Association, Inc., Bethesda Memorial Hospital, Inc., NME Hospitals, Inc. d/b/a Delray Community Hospital, John F. Kennedy Medical Center, Inc., Wellington Regional Medical Center, Inc., NME Hospitals, Inc. d/b/a West Boca Community Hospital, Boca Raton Community Hospital, Inc., Jupiter Hospital, Inc. and Pinecrest Rehabilitation Hospital, Inc. on

Count V (Lanham Act) of the Corrected Amended Counterclaims; and those claims are dismissed with prejudice;

e. [sic] In favor of Counterclaimant John F. Kennedy Medical Center, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $101,019.45;

f. [sic] In favor of Counterclaimant Pinecrest Rehabilitation Hospital and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $5,193.75;

g. [sic] In favor of Counterclaimant Bethesda Memorial Hospital, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VI (Florida RICO) of the Corrected Amended Counterclaims in the amount of $58,728.00;

h. [sic] In favor of Counterclaimant John F. Kennedy Medical Center, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $101,019.45;

i. [sic] In favor of Counterclaimant Pinecrest Rehabilitation Hospital and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $5,193.75;

j. [sic] In favor of Counterclaimant Bethesda Memorial Hospital, Inc. and against Counter-Defendants All Care Nursing Service, Inc. and Julie Monahan on Count

VII (Federal RICO) of the Corrected Amended Counterclaims in the amount of $58,728.00;

k. [sic] In favor of Counter-Defendants all Care Nursing Service, Inc. and Julie Monahan and against Counterclaimant High Tech Staffing Service, Inc. on Count I (Attempted Monopolization) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

l. [sic] In favor of Counter-Defendant all Care Nursing Service, Inc. and against Counterclaimant High Tech Staffing Service, Inc. on Counts II (Monopolization) and III (Tortious Interference) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

m. [sic] In favor of Counter-Defendants the P.D.Q. Nurse, Inc. and Donna Davis-Taurel and against Counterclaimant High Tech Staffing Service, Inc. on Count IV (Lanham Act) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

n. [sic] In favor of Counter-Defendants the P.D.Q. Nurse, Inc. and Donna Davis-Taurel and against Counterclaimant High Tech Staffing Service, Inc. on Count V (Civil Theft) of the Amended Answer and Counterclaim of Defendant High Tech Staffing Services, Inc. in both cases, and those claims are dismissed with prejudice;

o. [sic] In favor of Counter-Defendant all Care Nursing Service, Inc. and against Counterclaimant High

Tech Staffing Services, Inc. on Count IV (Lanham Act) of the Amended Answer and that claim is dismissed with prejudice. It is further

ORDERED and ADJUDGED that the prevailing parties shall submit Bills of Costs and Motions for Attorneys' Fees as appropriate, pursuant to Federal Rule of Civil Procedure 54(d)(1), (2)(B), (D) within 60 days of the issuance of a mandate from the Eleventh Circuit Court of Appeals on any appeal which may be taken from this final judgment, or within 60 days of resolution of any post-trial motions, if no notice of appeal from this judgment is filed. Failure to file a Bill of Costs or a Motion for Attorneys' Fees as appropriate prior to any appeal in this matter shall not constitute a waiver of any right thereto previously preserved, notwithstanding the time limits contained in the Local Rules of this Court.

APPROVED AS TO FORM:

/s/ James C. Paine
James C. Paine
United States District Judge

May 2, 1995
DATE

Carlos Juenke
Clerk of the Court

/s/ Svava Ringheim
(By) Svava Ringheim, Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 88-8568-CIV-PAINE
88-8572-CIV-PAINE

ALL CARE NURSING SERVICE, INC., et al.,

Plaintiffs,

vs.

BETHESDA MEMORIAL HOSPITAL, INC., et al.,

Defendants.

_____/

THE P.D.Q. NURSE, INC.,

Plaintiff,

vs.

SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., et al.,

Defendants.

_____/

OMNIBUS ORDER ON POST-TRIAL MOTIONS

This matter is before the Court upon the following post-trial motions:

(1) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims;

(2) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for New Trial;

(3) Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial;

(4) Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc.;

Upon review of the motions and memoranda, as well as the responses thereto, and the trial record of this cause, the court enters the following order.

FACTUAL BACKGROUND

On December 27, 1988, the Plaintiffs, All Care Nursing Services, Inc. ("All Care"), A Complete Health Care Services, Inc. ("Complete"), Benson's Health Care Services, Inc. ("Benson"), Critical Health Care, Inc. ("Critical") and Quality Professional Nursing of Florida, Inc. ("Quality") filed a Complaint[1] against thirteen Palm Beach County hospitals[2], eight temporary nursing service

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[1] The Plaintiffs subsequently filed an Amended Complaint on May 9, 1990.

[2] The Defendant hospitals include Delray Community Hospital, Bethesda Memorial Hospital, Inc., Doctors Hospital of Lake Worth, Inc., Good Samaritan Hospital, Inc., JFK Medical

agencies[3], and the South Florida Hospital Association, arising from the Defendants [sic] alleged plan to institute a "preferred provider program" for the provision of temporary nursing services.

On December 28, 1988, Plaintiff P.D.Q. Nurse, Inc. ("PDQ") filed a separate action alleging similar violations by the same Defendants. On February 21, 1989, this court entered an order consolidating the PDQ case with the All Care case.

In the Amended Complaint, the Plaintiffs alleged that in the summer of 1988, the Defendant hospitals met under the auspices of the SFHA and decided to develop a program under which certain of the temporary service agencies would be designated "preferred agencies."[4]

Center, Inc. Palms West Medical Center, Wellington Regional Medical Center, West Boca Medical Center, Boca Raton Community Hospital, Inc., Pine Crest Rehabilitation Hospital, Inc., Psychiatric Institute of America, Inc., and Jupiter Hospital, Inc. On January 17, 1990, the court dismissed Palm Beach Gardens Community Hospital. Further, Psychiatric has been dropped from the action and Doctors, Palms West and Good Samaritan have settled with the Plaintiffs.

[3] These defendant agencies include: High Tech Staffing Services, Inc., Nurses PRN, Inc., Medex of Florida, Inc., Expicare Nursing Agency, Inc., American Health Technologies, Inc., Angels in White, Inc., Olsten of West Palm Beach, and American Medical Staffing, Inc. Medex, Expicare, Olsten and American have settled with the Plaintiffs.

[4] According to the Plaintiffs, the Defendants [sic] actions were motivated by a nationwide shortage of nurses. Plaintiffs state that locally there has been a trend in Palm Beach County for nurses to leave permanent employment positions with hospitals to join temporary nursing agencies. This is because the

Temporary nursing service agencies were contracted directly or by way of notice in the *Palm Beach Post*, and were invited to submit bids for the provision of becoming preferred agencies. Sixteen temporary nursing services submitted bids.[5] Of this number, four agencies were eliminated because of their prices. The remaining agencies were asked to resubmit lower bids. Eight temporary nursing service agencies were selected as preferred agencies.

The Plaintiffs further alleged that, pursuant to the agreement among the hospitals, the preferred agencies and the SFHA hospitals agreed to purchase their agency services only from the preferred agencies at fixed prices and to the exclusion of all other agencies operating in the market unless such agencies were unable to fill a hospital's particular need. To maintain preferred status, these agencies were required to ensure that their nurses were covered by Workmen's Compensation and had to agree to rebate a percentage of their gross yearly income to the SFHA. Additionally, the agencies had to agree not to compete with the hospitals in the hiring of nurses.

Plaintiffs claimed that the purpose of this agreement was to (1) depress the prices for temporary nursing services; (2) stabilize the pricing of all nursing services; (3) set maximum prices for agency services and (4) eliminate temporary agencies from the market. Accordingly, the Plaintiffs alleged that the Defendants' action were an

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temporary agencies offer them higher wages as well as the freedom to work where and when they wish.

[5] The Defendants assert as an affirmative defense that Quality and All Care participated in the "preferred provider" program by "submitting bids and otherwise."

unlawful conspiracy in restraint of trade in commerce in violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1 and Florida Statute § 542.18. The hospitals counterclaimed against All Care and sued Defendant Monahan for, *inter alia*, violations of Florida and federal RICO.

After a one month trial during which some of the claims were dismissed, the jury rendered a verdict in favor of the Defendant hospitals on the anti-trust claims. The jury also rendered a verdict in favor of the hospitals and against All Care and Monahan on the RICO claims. In accordance with the jury verdict and all pre-trial and trial rulings on each claim, this court entered final judgment. The final judgment precipitated the timely-filed post-trial motions which the court now addresses.

I. Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc.'s Motion for Judgment as a Matter of Law

The Plaintiffs Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. have filed a Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims. In this motion, these Plaintiffs again ask this court to hold that the preferred provider program constituted a *per se* illegal horizontal price fixing agreement and a *per se* illegal group boycott.

Standard Governing Motion for Judgment As a Matter of Law

Federal Rule of Civil Procedure 50(a) states in pertinent part:

> "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

In considering such motions, the trial judge does not exercise discretion or credibility determinations, but, rather, he makes a ruling of law. *Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525, 1528 (11th Cir. 1989). In *Miles*, the Eleventh Circuit set forth the appropriate standard for the district court to employ upon consideration of such a motion:

> The court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the verdict is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

Id. at 1528.

Application of the Per Se Rule to the Boycott Claim

In his concurring opinion in *All Care Nursing Service v. Bethesda Memorial*, 887 F.2d 1535, 1539 (11th Cir. 1989), Chief Judge Tjoflat offered guidance to this court on when a court may apply the *per se* rule to the boycott and price-fixing claims as presented in this case.[6] Holding that this court previously held the mistaken belief that the per se rule would automatically apply to this case, Judge Tjoflat itemized the findings of fact that the court must enter before it may apply the per se rule to a case such as this. *Id.* Regarding the boycott claim, Judge Tjoflat held that the Supreme Court's opinion in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* , 105 S.Ct. 2613 (1985), prohibits the application of the per se rule to cooperative buying arrangements unless a court has made certain preliminary findings of

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[6] The Plaintiff contends that since Judge Tjoflat's concurrence in this case, the United States Supreme Court has issued two opinions which overrule Judge Tjoflat's concurring opinion. In the first, *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), the FTC sued a group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants who agreed to stop providing such representation until the District of Columbia increased group members compensation. The FTC was able to establish that the Defendants who were competitors, engaged in a horizontal arrangement to fix prices and had achieved their economic goal, which produced a crisis in the government's administration of criminal justice in that District. The record in the present case is distinguishable from the facts of the *Trial Lawyer's* case and, in the opinion of this court, the Supreme Court's ruling therein does not alter Judge Tjoflat's holding in *All Care*. Likewise, the second case, *Palmer v. BRG of Georgia*, 111 S. Ct. 401 (1990), does not require a different result.

fact. *All Care*, 887 F.2d at 1539. In *Northwest*, the Court held that "[a]bsent . . . a showing [of market power or exclusive access to an element essential to effective competition] with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." 105 S.Ct. at 2621. Therefore, Judge Tjoflat held that this court must make findings of fact with regard to the Defendants' market power and control over access to an essential element of competition. Judge Tjoflat specifically held that:

> If, for example, the district court finds that the SFHA is merely an association of small hospitals that, as a combined force, accounts for only a small share of the relevant market for temporary nursing services, then the court should hold that the SFHA does not possess market power. Likewise, if the court finds that members of the SFHA could contract independently with temporary nursing agencies, then the court might also find that the SFHA does not have control over access to an essential element of competition . . . If the court finds either that the SFHA had market power or that it had control over access to an essential element of competition, then the court should apply the per se rule of liability. Otherwise, the court should examine the buying arrangement under a rule of reason analysis.

All Care, 887 F.2d at 1540 (footnote, citations omitted).

In the present case, regarding the first element identified by Judge Tjoflat, *to wit*, market power, this court cannot make a determination that the Defendants possessed market power because the Plaintiffs have failed to

establish a relevant geographic market. The relevant geographic market is defined as the area of effective competition, the area in which the *seller* operates and to which the purchaser can practicably turn for supplies. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 321 (1961). Dr. Pisarkiewicz, Plaintiffs' expert, defined the relevant market in the present case as "the provision of temporary nursing services to hospitals by temporary nursing agencies in Palm Beach County." On cross examination of the Plaintiff's expert, the Defendants created a factual issue regarding the fact that this definition ignores actual and potential competition exerted by users of nursing services other than hospitals. The Defendants also produced evidence that established that some of the hospitals in Southern Palm Beach County are geographically located closer to hospitals in Broward County than they are to hospitals in Northern Palm Beach County. Plaintiff's market power theory depended upon the accuracy of Dr. Pisarkiewicz' relevant market definition. The Defendants successfully raised factual issues at trial with respect to the appropriate relevant market definition. Accordingly, this court cannot take the antitrust claim from the jury because there remained a jury question of fact regarding the SFHA's market power. Specifically, there remained a jury question with respect to the relevant market in which to measure the Defendants' market power.

Regarding the second element identified by Judge Tjoflat, *to wit*, whether the Defendants possessed exclusive access to an element essential to effective competition, it cannot be said on the present record that the Plaintiff has established that members of the SFHA could

not contract independently with temporary nursing agencies. The court cannot now hold as a matter of law that the facts adduced at trial establish that Defendants had control over access to an essential element of competition. Accordingly, the Plaintiffs cannot establish the second requisite element in order to qualify for application of the *per se* analysis to its antitrust claims.

Absent a showing of market power or exclusive access to an element essential to effective competition, the court must apply a rule of reason analysis. Accordingly, having failed to establish as a matter of undisputed fact that the Defendants either had market power or had control over an element essential to competition, the Plaintiffs cannot prevail on their motion for judgment as a matter of law with respect to the *per se* analysis of their boycott claim.

Application of the Per Se Rule to the Price-Fixing Claim

Judge Tjoflat correctly noted in his concurring opinion that the Supreme Court has never wavered from its application of the per se rule to price-fixing claims. *All Care* 887 F.2d at 1540 (citations omitted). However, upon review of the same record presently before this court, Judge Tjoflat noted that the Defendants had created a genuine issue of material fact regarding whether the Defendants ever entered into an agreement to fix prices. At trial the Defendants established, as they had previously alleged, that no maximum or uniform price was set for accepting bids. In fact, they also established that all of the bids ultimately accepted were *above* the price range suggested by the Defendants and more than the amount

paid for the services prior to the bid request. Judge Tjoflat held that not all joint purchasing agreements have a stabilizing effect on prices and result in antitrust liability. *Id.* He specifically stated:

> If the purchasing agent does not have market power or does not have control over access to an essential element of competition, then the agent will still have to bid against other purchasers for the scarce resources. Consequently, the [Plaintiffs'] price-fixing claim will stand or fall on the same findings of fact required to support their boycott claim: (1) did the SFHA have market power, and (2) did the SFHA control access to an essential element of competition?

Id. at 1540 (citations omitted).

Therefore, for the above-stated reasons and because the court cannot determine market power without defining the relevant market, Plaintiffs' Motion for Judgment as a Matter of Law must be denied.

Was the Preferred Provider Program an Unreasonable Restraint of Trade?

These Plaintiffs also urge the court to grant judgment as a matter of law on the ground that the Preferred Provider Program, as implemented, constituted an unreasonable restraint of trade.

In an attempt to protect interstate trade and commerce against unlawful restraints, Congress has declared that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is illegal. 15 U.S.C. § 1.

In order to establish that judgment should be entered in their favor as a matter of law pursuant to § 1 of the Sherman Act, these Plaintiffs must establish (1) a contract, combination or conspiracy of two distinct persons, (2) resulting in an unreasonable restraint of interstate trade or commerce, and (3) actual damage caused by an anti-competitive restraint of trade. *GTE Data Services, Inc. v. Electronic Data Systems Corp.*, 717 F.Supp. 1487, 1495 (M.D. Fla. 1989). Regarding the first element, it is now well settled that a unilateral refusal to deal does not demonstrate a conspiracy. *The Aquachem Co., Inc. v. Olin Corp.*, 699 F.2d 516 (11th Cir. 1983). Regarding the second element, it must be noted that the statute is designed to protect *competition*, not competitors. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied* 450 U.S. 1030 (1981).[7] Therefore, unfair competition does not become a Sherman Act violation unless there is (1) a market effect which would be prohibited under the law of mergers, and (2) other conduct that threatens Sherman Act values, such as elimination of competitors or increased prices. *Id.* Because market share is the principal judicial device for measuring actual or potential market power, the threshold inquiry is identifying the appropriate market. *United States v. Anchor* at 994. The definition of the relevant market is essentially a factual question and the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers. *Id.* at 994. In the present case, the court finds that

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[7] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

the Plaintiffs have failed to establish a relevant geographic market. Accordingly, it is impossible for this court to hold as a matter of law that the Preferred Provider Program, as implemented, constituted an unreasonable restraint of trade. Therefore, Plaintiffs' motion for judgment as a matter of law on these grounds must be denied.

Finally, this court is not inclined to grant Plaintiffs' motion for judgment as a matter of law regarding High Tech Staffing's participation in the antitrust violations or the *in pari delicto* defense. The court finds that questions of fact preclude the entry of judgment as a matter of law on these issues of whether High Tech was a member of an antitrust conspiracy or whether these Plaintiffs themselves participated in the challenged program. Additionally, the court finds that entry of judgment on either of these claims, even if appropriate under the record, would be meaningless in light of the jury's verdict for the Defendant on the relevant geographic market.

II. Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service. Inc. Motion for New Trial

In order to grant a motion for new trial, this court in its discretion must find that the jury verdict was contrary to the great weight of the evidence. *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994).

These Plaintiffs challenge the verdict form which required the jury to render a threshold, dispositive interrogatory verdict on relevant geographic market. The verdict form is consistent with this court's ruling, both at the

summary judgment stage and at the motion for judgment as a matter of law stage. As set forth in detail above, absent proof of market power, the cooperative buying agreement qualifies for rule-of reason [sic] treatment. Therefore, absent proof of a relevant geographic market, the jury verdict was properly rendered in favor of the Defendants. The remaining arguments regarding jury instructions are equally without merit, and, in light of the jury's verdict on the relevant market definition, would constitute harmless error, if any exists at all.

Plaintiffs also seek a new trial on the grounds that this court improperly denied its [sic] request, at the close of evidence, to amend the pleadings to conform to the evidence. These Plaintiffs sought to amend the pleadings to include claims (1) that the Defendants, through the Preferred Provider Program, as implemented, tortiously interfered in the relations between Plaintiffs and the nurses, and (2) against High Tech Staffing Service, Inc. for participation in a *per se* unlawful group boycott.

Regarding the former claim, the court denied Plaintiffs [sic] Motion to Amend to Conform to the Evidence because the evidence did not support Plaintiff's newly raised tortious interference claim. In order to overcome the competitor's privilege in a tortious interference action in Florida, Plaintiffs would bear the burden of proving that Defendant's [sic] interfered by means of "physical violence, misrepresentation, illegal conduct or threat of illegal conduct, and the like." *Fl. Standard Jury Instructions in Civil Cases*, MI 7.2 at 2 (1985). In the present case, the tortious interference claim was to be premised upon Defendant's alleged illegal antitrust conduct. In light of the jury's verdict in favor of the Defendants on this claim,

and this court's finding that Plaintiff did not produce additional evidence to support the claim, Plaintiff's motion for new trial based upon failure of this court to grant leave to amend, must be denied.

Regarding the latter claim, the court finds that, because the *per se* unlawful group claim was rejected, the failure of this court to permit amendment to include High Tech in it, was not error warranting a new trial.

Finally, Plaintiffs complain of Defense counsel's comments during closing argument. The Plaintiffs argue that, in explaining Defendants [sic] motives and cost-consciousness, the Defendants impermissibly invoked the "golden rule," thereby inflaming the jury. A review of the transcript reveals that Defense counsel made no suggestion that the jury had a stake in the outcome of the case, but instead explained the effect on consumers of the conduct at issue. If Plaintiffs desired some sort of clarifying curative instruction, they could have requested one at the time of closing argument. However, the Plaintiffs neither contemporaneously objected nor sought a curative instruction to clarify counsel's comments. The court finds that the challenged comments were neither inflammatory nor violative of the golden rule. Accordingly, Plaintiffs [sic] Motion for New Trial must be denied on these grounds.

III. Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial

To the extent that these Plaintiffs adopt the motion of their co-plaintiffs with respect to judgment as a matter of law as to the antitrust claims, for the reasons set forth above, this motion must be denied with respect to the antitrust claims.

Plaintiffs AllCare and Monahan also seek judgment as a matter of law on the counterclaims and the third party claims against Monahan, *to wit*, Florida and Federal RICO. This court has on several occasions in the past rejected AllCare and Monahan's contention that the Joint Commission on Accreditation of Health Care Organizations, which provides that Defendant hospitals are responsible for checking the credentials of all personnel working at the hospital, somehow excuses their unrelated conduct of having misrepresented the credentials of temporary personnel services purchased from them by the hospitals. While such an argument is, of course, relevant to the issue of a hospital's liability to an injured victim of medical malpractice, it has absolutely no relevance in a RICO action in which the hospitals charge that AllCare and Monahan misrepresented the credentials of its personnel, for whom the hospitals were fraudulently overcharged. The hospitals are not seeking to avoid liability for the malpractice of the overcharged, under-credentialed personnel fraudulently provided by AllCare at Monahan's direction. Plaintiff's argument that the hospitals alleged non-compliance with the standard "can cause

irreparable harm or death to patients" simply has no bearing on the RICO verdicts against AllCare and Monahan. To suggest that a temporary nursing service can avoid liability for fraud against a hospital because a standard designed to protect patients requires the hospital to check the credentials of health care workers, is illogical. Additionally, even if the Standards had any bearing on the RICO claims, Plaintiffs continuously and without explanation, fail to cite the provision of those standards which clearly permits a hospital to do exactly what the defendants did in this case, i.e. to *rely* on the outside evaluation of the nurses credentials. The facts in this record support a finding that the hospitals were lied to about the credentials of some nurses provided to them by AllCare and Monahan. Nothing in the above-cited standards insulates AllCare or Monahan from liability for their fraud upon the hospitals.

Regarding AllCare and Monahan's challenge to the Defendants' reliance on the misstatements for the purpose of establishing damages[8], this record is replete with abundant proof that the Defendant/CounterPlaintiff hospitals relied in fact upon AllCare and Monahan's deception. First, it is undisputed on this record that the hospitals relied upon the representation that nursing personnel were credentialed when they put them on duty in the capacity which their falsely represented credentials

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[8] As this court ruled at the charge conference, reliance is not an element of a RICO claim, except to the extent that a RICO Plaintiff must prove that he was injured by reason of the Defendant's acts of deception. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991).

justified. Second, it is also undisputed that, upon completion of the shift and upon receipt of a bill from AllCare, which charged at the higher credentialed rate, the hospitals remitted payment as charged, unaware that the nurse was not credentialed as represented by AllCare and Monahan. All Care's argument that the invoices which were sent through the mail were not false is simply belied by the undisputed evidence in this record. There is ample, unrefuted evidence in this record to support the jury's verdict that the mailed invoices were false. Simply stated, AllCare and Monahan charged the hospital for services which were not rendered. The jury verdict against AllCare and Monahan on the RICO claims is amply supported by the evidence and will not be disturbed.

AllCare and Monahan now challenge the court's RICO instruction which includes coverage of the mail-fraud offense. It is noteworthy that the instruction given is the Fifth Circuit Pattern Instruction on RICO and that prior to trial, AllCare and Monahan stipulated to the instruction. Thereafter, in accordance with the stipulation, the hospitals presented proof as required by the agreed upon pattern instruction. Accordingly, this court finds that in the interest of justice and fairness, AllCare and Monahan waived any objection to the stipulated instruction as given. However, even if the court were inclined to consider the belated objection, the court finds that the Fifth Circuit Pattern Instruction as given was adequate under Eleventh Circuit authority and that no additional reliance, beyond proof of injury was required. *Pelletier* requires only that the RICO Plaintiff establish

that he was injured by reason of the Defendant's deception. The RICO charge given was correct and Counterdefendant AllCare and Defendant Monahan's motion charging error therein must be denied.

Likewise, the jury's failure to fill in the "hospital bill" and "bill date" on the interrogatory verdict form does not warrant a new trial. These lines were "worksheet" lines and the verdict as presented is not vague because it is readily apparent from the amount of the verdict that the jury adopted *in toto* the hospitals' claimed damages. Further, AllCare could have objected to this failure at the time the jury verdict was rendered. At that time, prior to discharge of the jury, Mr. Scarola asked to personally review the verdict and he was given an opportunity to do so. If Mr. Scarola thought that the verdict was ambiguous or incomplete, he should have objected at that time, thereby enabling the court to send the jury back to fill in the worksheet lines. Having failed to contemporaneousy [sic] object prior to discharge of the jury, AllCare waived any possible objection to this alleged error in the verdict form. *See, Austin-Westshore Connst.* [sic] *v. Federated Dept. Stores,* 934 F.2d 1217, 1226 (11th Cir. 1991) (When a jury interrogatory contains alleged ambiguities or inconsistencies, a party must object before the jury is excused, or the objection is waived).

Finally, the Plaintiffs contend that the economic loss rule required dismissal of the RICO claims. While this court dismissed the pendent tort claims because the economic-loss rule barred same, this court has already determined that the economic loss rule does not bar the RICO claims against AllCare and Monahan. The Eleventh Circuit has already rejected a RICO defendant's argument

that Florida's economic loss rule barred an award of treble damages for RICO violations where "the same conduct forms a basis for a breach of contract claim." *Arabian American Oil Co. v. Scarfone*, 939 F. 2d 1472, 1478 (11th Cir. 1991). In fact, as noted by the Eleventh Circuit in *Scarfone*, many RICO cases involve contract disputes. *Id.*

In view of all of the foregoing, the Motion for Judgment as a Matter of Law or in the Alternative for New Trial must be denied.

IV. Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc.

Plaintiffs AllCare, Julie Monahan and the P.D.Q. Nurse, move to strike High Tech's Notice of Appeal on the sole ground that the notice was signed by Thomas J. Larkin, Esq. This court previously required that High Tech be represented by counsel other than Larkin at trial because Larkin was to be a material witness at trial. Mr. Larkin is an attorney duly admitted to practice in this court. With the permission of this court, he handled all pre-trial litigation. The court finds that Rule 4.3-7 does not prevent Mr. Larkin from representing High Tech in the appeal if he desires to do so. Accordingly, the motion to strike on this ground must be denied.

However, because the notice of appeal was filed prior to the expiration of time for the filing of post-trial motions, the notice was premature. High Tech has no objection to the striking of the notice as premature.

Accordingly, the notice of appeal will be stricken and the time for filing such notice will not begin to run until this order is entered by the clerk of the court.

In view of all of the foregoing, it is

ORDERED and ADJUDGED that

(1) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for Judgment as a Matter of Law in their favor on the Anti-trust Claims is DENIED;

(2) Plaintiffs' Quality Professional Nursing, Inc., Critical Health Care, Inc., and A Complete Health Service, Inc. Motion for New Trial is DENIED;

(3) Plaintiff PDQ Nurse, Inc., Plaintiff/Counterdefendant All Care Nursing Service, Inc., and Defendant Julie Monahan's Renewed Rule 50 Motion for Judgment as a Matter of Law and, alternatively, Rule 59 Motion for New Trial is DENIED;

(4) Plaintiff All Care Nursing Service, Inc., Julie Monahan and the P.D.Q. Nurse, Inc. Motion to Strike Notice of Appeal filed by Defendant High Tech Staffing Services, Inc. is DENIED; the court *sua sponte* strikes the notice of appeal as being untimely.

Finally, it is

ORDERED and ADJUDGED that there are presently no pending motions in this case and that the clerk of the court shall close this case and declare each and every pending motion to be resolved.

DONE and ORDERED in West Palm Beach, Florida, this 25th day of August, 1995.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

Copies furnished to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,
BENSON HEALTH CARE SERVICES, INC.,
A COMPLETE HEALTH SERVICE, INC.,
QUALITY PROFESSIONAL NURSING,
INC., CRITICAL HEALTH CARE,
INC., ET AL.,

Plaintiffs-Appellees,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
INC. [sic] NME HOSPITALS, DOCTORS
HOSPITAL OF LAKE WORTH, INC.,
GOOD SAMARITAN HOSPITAL, INC.,
JFK MEDICAL CENTER, INC., ET AL.,

Defendants,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant.

95-5218

D.C. Docket No. 88-8568-CIV-JCP

ALL CARE NURSING SERVICE, INC.,

Plaintiff-Appellant,

BENSON HEALTH CARE SERVICES, INC.,

Plaintiff,

A COMPLETE HEALTH SERVICE, INC.,
QUALITY PROFESSIONAL NURSING, INC.,
CRITICAL HEALTH CARE, INC.,
PDQ NURSE, INC.,

Plaintiffs-Appellants,

JULIE MONAHAN,

Counter-Defendant-
Appellant,

versus

BETHESDA MEMORIAL HOSPITAL, INC.,
INC. [sic] NME HOSPITALS, DOCTORS
HOSPITAL OF LAKE WORTH, INC.,
GOOD SAMARITAN HOSPITAL, INC.,
JFK MEDICAL CENTER, INC.,
ET AL.,

Defendants-Appellees,

HIGH TECH STAFFING SERVICES, INC.,

Defendant-Appellant-
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 18, 1998)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 1998, ___ F.2d ___).

Before EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judges [sic].

BY THE COURT:

The Petition(s) for Rehearing on the antitrust issues in this case are DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Appellants, All Care Nursing Service, Inc., Julie Monahan, and The PDQ Nurse, Inc., filed a separate Petition for Rehearing on the issue of the applicability of the economic loss rule to civil Florida RICO claims. About this issue, the relevant Appellees are directed to file a reply to this petition. The reply shall be no longer than 12 pages, spaced according to the rules of this circuit, and should be filed within 21 days from the date of this order.

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* Honorable Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4714 & 95-5218

ALL CARE NURSING SERVICE, INC., et al.

Plaintiffs-Appellants,

versus

BETHESDA MEMORIAL HOSPITAL, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Sep. 18, 1998)

BEFORE: EDMONDSON and BARKETT, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants, all Care Nursing Service, Inc., Julie Monahan, and the PDQ Nurse, Inc. Is [sic] denied.

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* Honorable Harry W. Wellford, Senior U.S. Circuit Judge Sixth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

No. 98-989

In The

Supreme Court of the United States

October Term, 1998

QUALITY PROFESSIONAL NURSING, INC., CRITICAL HEALTH CARE, INC., A COMPLETE HEALTH SERVICE, INC., ALL CARE NURSING SERVICE, INC., AND THE PDQ NURSE, INC.,

Petitioners,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A/ DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC., D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., and HIGH TECH STAFFING SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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131 FF
F.D.

QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals properly applied controlling precedents requiring that alleged restraints of trade be analyzed under the rule of reason unless the conduct in question is a naked restraint of trade, having no potential or capacity to promote or increase competition in the relevant market.

Whether the Eleventh Circuit Court of Appeals' opinion may be reasonably understood as having departed from controlling precedents applying the *per se* rule to naked restraints of trade.

Whether the "Preferred Provider Program" was properly analyzed as a group buying arrangement in that the evidence presented plausible arguments that the Program was intended to enhance overall efficiency and make the market more competitive.

Whether the jury's rejection of the only relevant market definition Petitioners attempted to prove was dispositive of their antitrust claims.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF THE CASE 1

A. Statement Of Facts 2

1. The Market For Hospital Services 2

2. The Market For Nursing Services 2

3. Quality Care, Seasonal Fluctuations And Staffing 3

4. Agency Functions And Problems 4

5. The Preferred Provider Program 5

6. The Price Went Up 7

7. Implementation And Injunction 8

8. Changes In The Market And Their Impact On Agencies 8

B. Course Of Proceedings Below 9

SUMMARY OF THE ARGUMENT 12

ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

I. THE ELEVENTH CIRCUIT'S DECISION CORRECTLY APPLIES WELL-SETTLED ANTITRUST PRINCIPLES 14

II. THE ELEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH, AND ADVANCES PUBLIC ANTITRUST POLICY AS ANNOUNCED BY DECISIONS OF THIS COURT 18

A. The Eleventh Circuit Neither Misconceived Nor Misapplied The Law Applicable To Horizontal Price Fixing 21

B. The Eleventh Circuit Did Not "Misapply" *BMI* 22

C. The Eleventh Circuit Did Not Misapprehend The Program's Horizontal Component 24

D. The Program Constituted Pro-Competitive Group Buying 25

III. THE ELEVENTH CIRCUIT CORRECTLY CONSIDERED AND REJECTED PETITIONERS' CONTENTION THAT THE PROGRAM WAS A *PER SE* ILLEGAL GROUP BOYCOTT 25

IV. NO APPLICABLE PRECEDENT EXCUSES PETITIONERS' FAILURE TO PROVE A RELEVANT MARKET 26

CONCLUSION 28

APPENDIX (Including Corporate Disclosure Statement) ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

All Care Nursing Service, Inc. v. Bethesda Mem'l Hosp., Inc., 135 F.3d 740 (11th Cir. 1998) 1

All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535 (11th Cir. 1989) 9

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) 10

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 17, 22, 23, 24

Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992) 27

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 10, 17, 26, 27

FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) 20, 26

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 18, 27

National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) 23

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) 12, 14, 16, 26

National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965) 18, 19

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) ... *passim*

Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc., 105 F.3d 1376 (11th Cir. 1997) 12

State Oil Co. v. Kahn, 522 U.S. 3, 118 S.Ct. 275 (1997) 20, 24

Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558 (10th Cir. 1991) 27

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 21, 22

OTHER AUTHORITIES

4 Trade Reg. Rep. (CCH) ¶¶ 13, 20, 153, 812, n.17 25

7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986) 27

ABA Antitrust Section, *Antitrust Law Developments*, 391 (3d ed. 1992) 16

Joint Purchasing Monopsony, and Antitrust, *The Antitrust Bulletin*, 29-30 (Spring 1991) 16

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 135 F.3d 740 (11th Cir. 1998), and is appended to the Petition for Certiorari at pages 1-20. It is cited herein as [Pet. App. 1-20].

The unreported denial of the petitions for rehearing is appended to the Petition at pages 51-52 and it is cited herein as [Pet. App. 51-52].

The unreported denial of suggestions of rehearing *en banc* is appended to the Petition at pages 54-55 and it is cited herein as [Pet. App. 54-55].

The judgment of the district court is appended to the Petition at pages 21-28 and it is cited herein as [Pet. App. 21-28].

The district court's opinion denying post-trial motions is appended to the Petition at pages 29-50 and it is cited herein as [Pet. App. 29-50].

STATEMENT OF THE CASE

Respondents are eight Palm Beach County, Florida hospitals (the "Hospitals"), the South Florida Hospital Association ("SFHA") and High Tech Staffing Services, Inc. ("High Tech"), a temporary nursing agency. The Eleventh Circuit's opinion affirms a judgment entered following a four-week jury trial on claims that a joint purchasing arrangement for temporary nursing services

violated Section One of the Sherman Act and its Florida counterpart.[1]

A. Statement Of Facts

1. The Market For Hospital Services

During the late 1980s, hospitals in South Florida were engaged in vigorous competition for patients. [App. 1]. Patient census was flattening or declining. [App. 1-2]. Revenue pressure came from both private and public financing mechanisms. [App. 2-3]. Medicare regulations limited hospital compensation. [App. 3-4]. Privately insured or self-financed patients were accounting for an increasingly negligible share of the market. [App. 4]. Managed care plans began to dominate the market. They used the collective bargaining power of large groups of buyers (patients) to negotiate favorable hospital contract rates for terms of one year or longer. [App. 4]. This put a premium on a hospital's ability to predict its costs. [App. 4-5].

2. The Market For Nursing Services

Nurses are trained to work in hospitals, nursing homes, doctors' offices, clinics and other facilities, as well as in patients' homes. There is significant substitution

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[1] The final judgment also rejected claims for tortious interference with the business of temporary nursing agencies and awarded damages against Petitioner All Care Nursing Services, Inc., and its president, Julie Monahan, under the federal and Florida civil RICO statutes. [Pet. App. 21].

across these different work environments. [App. 5].[2] In the late 1980s, there was a nationwide shortage of available nurses. The market responded in a variety of ways, and the recession of the early 1990s drew some nurses back into the work force. [App. 5-6]. Hospital demand for nursing services eased as technology advanced and government and private payers pressed for shorter hospital stays and home care. [App. 5-6]. As of the early 1990s, the nationwide nursing shortage had ended. [App. 6].

3. Quality Care, Seasonal Fluctuations And Staffing

South Florida's winter climate causes hospitals' patient censuses to seasonally fluctuate by as much as thirty percent. [App. 7]. This presents obvious staffing challenges. Hospitals respond by hiring full-time and part-time nurses to meet off-peak needs. To meet peak demands, they add supplemental personnel drawn from a variety of sources. [App. 7-8]. "Per diem" nurses are hospital employees available to work open shifts on short notice. "Contract nurses" work full-time for a specified

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[2] Hospitals utilize several categories of nursing personnel. Registered Nurses ("RNs") hold the highest level of education and skill, and are licensed by the State of Florida to administer without supervision medications ordered by physicians. Licensed Practical Nurses ("LPNs") hold a lesser license and level of training, and may administer medications only under the supervision of a physician or RN. Certified Nursing Assistants ("CNAs") provide support to both RNs and LPNs, and are certified by the State upon completion of a standardized test and a course in basic health care skills, including first aid and CPR. [App. 6].

number of weeks. "Travel nurses" are contract nurses recruited from other areas of the country. "Temporary nurses" are hired through agencies on a shift-by-shift basis. [App. 8]. Temporary nurses are the least desirable option. Cost per hour is highest, the nurse is often unfamiliar with the hospital's staff, physical plant, protocols and procedures and evaluation of credentials and competence is often difficult. [App. 8-9].

4. Agency Functions And Problems

Nursing agencies keep non-exclusive lists of nurses who are available to fill shifts on call. Most agencies market their registry to many users of nursing services, including hospitals, nursing homes and home care. The agencies' rates are typically thirty percent higher than the rate for staff nurses. The agency pays the nurse ten percent more than the hospital would pay. The balance is the agency's margin. [App. 9-10].

As dependence on temporary nurses increased, administrators became increasingly concerned about quality of care. Agency nurses who performed poorly at one hospital would simply be sent to another where the problem would often resurface. There were no ready means for effectively sharing this information. [App. 10-12]. Hospitals' advance requests for a particular nurse proved ineffective, as agencies engaged in "phantom booking" (*i.e.*, promising to send a particular nurse, but substituting another) and "blind booking" (*i.e.*, promising a nurse though none was available and then canceling at the last minute if no nurse was found). [App. 12]. Many

agencies regarded their nurses as independent contractors, not employees. This relieved the agency of income tax withholding, unemployment and liability insurance and other costs, but it subjected the hospitals to concomitant risks. [App. 13-14].

Some agencies engaged in practices that compromised patient welfare or created contentious working relationships. [App. 14-15]. Most egregiously, petitioner All Care stole copies of hospital medication tests administered to ensure professional competence and provided the answers to their nurses with instructions to cheat. [App. 15-18]. During discovery, the Hospitals learned that All Care had repeatedly altered or misrepresented its nurses' credentials. [App. 18-19]. If no registered nurse was available, All Care would find a licensed practical nurse to masquerade as one, falsifying such records as were necessary to complete the deception. [App. 18-19].

As quality decreased, temporary nursing costs increased frequently, dramatically and unpredictably. [App. 19]. This seriously impaired planning, budgeting and effective contract negotiation with managed care plans.

5. The Preferred Provider Program

In the late 1980s, the Hospitals made individual attempts to deal with these problems through the use of generic contracts. However, these efforts had proved inefficient and unsuccessful. [App. 19-20]. At the same time, the SFHA developed a "Preferred Provider Program" (the

"Program") in other counties. The Program utilized the familiar mechanism of a group buying program to create efficiencies and address the common problems hospitals faced with agencies. The SFHA proposed a separate but similar program to the Palm Beach County Nursing Administrators Association. Twelve Palm Beach County hospitals, including Respondents, became SFHA associate members, and agreed to participate. [App. 63-70].

The SFHA distributed requests for proposals to all known agencies and a newspaper advertisement invited all others to submit bids. Each proposal was to include an agreement to employ nurses, to pay all taxes, insurance and unemployment benefits and to submit all nurses for pre-screening, testing and orientation. [App. 43-62]. As was customary, agencies agreed not to directly solicit a hospital's nurses, but the agencies remained free to advertise and hire any who applied. [App. 21]. The agencies would bid the price at which each was willing to provide services for one year. [App. 21]. The winning bidders would be selected as "preferred providers." Preferred status would lead to higher volumes as the hospitals agreed to use preferred agencies first and to use others only when the preferred agencies could not supply a nurse. [App. 33-34].

The Program integrated certain purchasing functions. These included (a) a "nurse liaison" to pre-screen nurses, coordinate hospital orientation sessions, verify licensure, administer tests and centrally monitor nurse performance [App. 37-39]; (b) contribution of a two percent fee to cover Program expenses (paid by the agencies, but recouped through inclusion in the bid rates); and, (c) a

select committee tasked with choosing the preferred providers. [App. 22-23].

6. The Price Went Up

Sixteen agencies submitted bids, including some of the petitioners. [App. 23-24]. The prices bid were higher than prevailing prices, as they reflected the costs of higher nurse salaries, taxes, employment, insurance and the administrative fee. The hospitals were disappointed, as they had hoped that the prospect of higher volumes would result in lower prices. [App. 24]. The SFHA then requested a second round of bids and suggested rates the hospitals regarded as reasonable.

As the process continued, some agencies expressed concern about making yearlong price commitments. In ensuing negotiations, the hospitals agreed to add an "escape clause" permitting contract termination on thirty days notice. [App. 24-25; 33].

Some agencies submitted new, lower bids, while others did not. Notably, no agency submitted bid prices as low as those the SFHA suggested. [App. 25]. The committee interviewed the agencies and selected eight bidders as preferred. Selection criteria included competence, service offering, quality and bid price. Price was not dispositive; some agencies were selected over agencies that had bid lower prices. [App. 26-28]. Each of the Hospitals then signed individual supply contracts with each preferred agency. In every case, the contract price was that bid by that particular agency. As a result, the prices were not uniform. [App. 25-26; 28]. They were, however, higher than pre-Program prices. [App. 28-29;

compare App. 40-42 to 71-82]. Several preferred agencies elected to reduce their profit margins, but many extended raises to their nurses in anticipation of greater volumes. [App. 29].

7. Implementation And Injunction

The Program commenced in November 1988. The Program was in place approximately three months; during that period, $2 million in temporary services were purchased by the hospitals. A substantial amount of that business was given to non-preferred agencies under the Program's terms. [App. 29-30]. The District Court enjoined the Program in February 1989. The Eleventh Circuit dissolved the injunction in November 1989, but the Program was not reinstated.

8. Changes In The Market And Their Impact On Agencies

During the late 1980s and early 1990s, Medicare, managed care and other cost containment pressures moved patients home for recuperation after shorter hospital stays. Many agencies responded by shifting their focus to home care, which they found to be more lucrative. [App. 30-31]. Hospital staffing declined both nationwide and in South Florida as a component of nursing agency business. [App. 31]. Successful preferred and non-preferred agencies anticipated and capitalized on these trends. Declines in Petitioners' businesses were attributable to management limitations and other internal difficulties. Throughout this period, the number of nursing

agencies in Palm Beach County remained fairly constant. [App. 31-33].

B. Course Of Proceedings Below

Petitioners' suit alleged that the Program was *per se* illegal as price fixing and a group boycott, and unreasonably restrained trade in the relevant market they defined as "temporary nursing services provided to hospitals in Palm Beach County, Florida." [Pet. App. 37]. In November 1989, the Eleventh Circuit Court of Appeals vacated the District Court's preliminary injunction for failing to hold an evidentiary hearing on the "relevant product market, and the existence of market power" and other fact issues. *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1539 (11th Cir. 1989).

At trial, the District Court first reserved and later denied Petitioners' motions for directed verdict and motion for a judgment as a matter of law. The jury subsequently rejected Petitioners' only proffered relevant market definition, and returned a verdict for respondents. Post-trial motions for judgment as a matter of law and for a new trial were denied. [Pet. App. 29-50].

In affirming, the Eleventh Circuit examined the Program's reliance on competitive bidding for year-long supply contracts that offered the reasonable expectation of increased volumes and resulting efficiencies. The court also considered the Program's non-price mechanisms and standards which integrated some purchasing functions and addressed quality, tax, employment and insurance

issues. With this predicate, the Eleventh Circuit rejected Petitioners' attempt to "pigeonhole"[3] the Program as either price fixing or a group boycott. Citing this Court's holding in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 726 (1988), the court held that

> a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed *per se* unreasonable.

Pet. App. at 11. Whether *per se* or rule of reason analysis applies, the court continued, turns on whether

> the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or [is] instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Id., quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289-90 (1985).

The Eleventh Circuit explained that Petitioners had the burden to make a threshold showing that the Program fell into one of these forbidden categories. Pet. App. at 12, citing *Northwest*, 472 U.S. at 298. The court next analyzed Petitioners' contention that the Program constituted *per se* illegal horizontal price fixing because it was intended to "stabilize" prices for temporary nursing services. It rejected this argument on the grounds that price fixing is

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[3] The court recognized that this Court "has refused to force various practices into 'pigeonhole[s] and [to invoke] the *per se* rule' ", *quoting FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986).

a question of effect, not intent, and that the Program was not inherently anticompetitive. The hospitals never agreed on prices or a range of prices. The prices resulted from open, competitive bidding. And while the prices were "stabilized," in that individual one-year contracts resulted, this was not the kind of " 'stabilization' that can be viewed as price fixing" as the "escape clause allow[ed] the market, not the SFHA, to be the ultimate decision maker for each hospital and each agency on the issues of price, demand, supply, and terms of dealing." [Pet. App. at 15.]

The court, adhering to this Court's decision in *Northwest*, also found that the Program was not a *per se* illegal group boycott. "It is no longer true", the court explained, that "relevant market definition is a factor only after it has been decided that the rule of reason applies." [Pet. App. at 16]. Under *Northwest*, the court continued, a presumption of anticompetitive effects is unwarranted "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition." [Pet. App. at 16, *quoting Northwest*, 472 U.S. at 296.]

The court then found the Program to have procompetitive features not found in a *per se* illegal group boycott. All agencies were entitled to bid, and hospitals purchased from non-preferred agencies when preferred agencies were unable to provide a nurse. Further, non-preferred agencies had numerous competitive opportunities besides the participating Hospitals. *Per se* treatment of any alleged boycott is unwarranted, the court continued, unless " 'the practice at issue historically leads to anticompetitive effects in the market.' " Pet. App. at 17,

quoting Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc., 105 F.3d 1376, 1381 (11th Cir. 1997). The court concluded that *per se* treatment was inappropriate because "no history of this kind seems to exist for health-care preferred-provider programs materially similar to what we have before us now." [Pet. App. at 17].

Turning to the rule of reason, the court found no basis for reversing the jury verdict rejecting Petitioners' only proposed relevant market definition. The court affirmed because this verdict precluded the necessary finding that the Program had anticompetitive effects in any relevant market.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's opinion represents a correct and uncontroversial application of well established antitrust principles to a Program that was, in form and substance, a group buying arrangement. This Court, in *Northwest*, recognized that group purchasing arrangements possess procompetitive features that preclude *per se* condemnation absent shared market power or exclusive access to a resource necessary for competition. In so ruling, this Court reiterated its pronouncements in *BMI* and *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104, n. 26 (1984) (*"NCAA"*) that *per se* analysis does not turn on whether the challenged conduct literally can be described as "price fixing" or a "group boycott" to which the *per se* rule might be applied. Instead, a court must examine the conduct to determine whether it has

procompetitive features or is of the type historically condemned as a naked restraint of trade.

At trial, petitioners attempted to prove that the relevant geographic market was confined to the political boundaries of Palm Beach County, Florida, even though that county is but one of four counties and numerous municipalities that lie within the contiguous South Florida metropolitan area. They attempted to confine the service market to nursing services provided by temporary nursing agencies to hospitals, ignoring nursing homes, home care, travel nurse agencies and other buyers and sellers. The jury rejected this arbitrary definition under proper instructions.

Petitioners' failure to prove a relevant market was fatal to their claims. The requisite finding of market power or actual anticompetitive effects within a defined market could not be made in the resulting analytical vacuum. Petitioner's demand for *per se* condemnation is an effort to overcome that failure by substituting a labeling exercise for the reasoned analysis this Court's decisions require.

The Eleventh Circuit properly grounded its decision on undisputed evidence that the Program's prices resulted from open, competitive bidding; that the Hospitals never agreed on a price or a price range; that preferred agencies were free to opt out of one year price commitments on short notice; that the Program included non-price features designed to enhance efficiency, lower administrative costs and improve quality; and that the Hospitals could and did purchase services from non-preferred agencies. No reported decision has ever applied

the *per se* rule to analogous activity. Moreover, *Northwest*, as informed by *BMI* and *NCAA*, forbids that result. Accordingly, none of the factors favoring review on certiorari are present.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION CORRECTLY APPLIES WELL-SETTLED ANTITRUST PRINCIPLES

In *Northwest*, this Court considered whether a buying cooperative's expulsion of a member was an illegal group boycott. The case presented the Court with "broader questions as to when *per se* antitrust analysis is appropriately applied to joint activity that is susceptible of being characterized as a concerted refusal to deal." *Northwest*, 472 U.S. at 286. Recognizing that group boycotts are often condemned as *per se* violations, the Court analyzed its prior decisions to determine which types of group activity mandate *per se* treatment. These activities, the Court found, exhibit the likelihood of predominantly anticompetitive consequences and generally are unsupported by plausible efficiency or procompetitive justifications. The Court concluded that

> [w]holesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and

> render markets more, rather than less, competitive."

Id., at 294-95, *quoting BMI*, 441 U.S. at 20.

Northwest is instructive here in two key respects. First, the Court reaffirmed its pronouncements in *BMI* and *NCAA* that the *per se* rule will not be carelessly applied. Instead, *per se* analysis will turn on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or [is] instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Northwest*, 472 U.S. at 289-90, citing *BMI*, 441 U.S. at 19-20. While "price-fixing" and "group boycotts" can be unlawful *per se*, a literal approach to *per se* analysis is "overly simplistic and often overbroad," because "easy labels do not always supply ready answers." *BMI*, 441 U.S. at 8-9. For example, although every joint purchasing agreement entails an agreement whereby purchasers literally "fix" prices and "refuse to deal" with certain suppliers, many such agreements promote competition. It follows that the presence of literal "price stabilization" or a "concerted refusal to deal" is the beginning of the analysis, not the end. *See Northwest*, 472 U.S. at 295-98.

Second, *Northwest* prescribes the appropriate analysis for joint purchasing arrangements. Because such arrangements do not characteristically result in predominantly anticompetitive effects, the Court held that

> [u]nless the cooperative possesses market power or exclusive access to an element essential to

> effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.

Id., at 295-96, citing *NCAA*, 468 U.S. at 104, n. 26 ("[*p*]*er se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). The Court concluded that a plaintiff

> seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.

Id., at 298.[4]

Petitioners attempt to distinguish *Northwest* on the ground that the Program did not enable smaller buyers to aggregate their purchase volumes and thereby obtain discounts available on the open market to larger competitors. This argument ignores undisputed record evidence that the Program offered identical or equivalent incentives and efficiencies. The participating hospitals agreed

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[4] Commentary on the evolution of antitrust analysis of joint purchasing confirms that such conduct is illegal *per se* only in extreme circumstances. *See* Jonathan M. Jacobson and Gary J. Dorman, "Joint Purchasing, Monopsony, and Antitrust," *The Antitrust Bulletin*, 29-30 (Spring 1991); *see also* ABA Antitrust Section, *Antitrust Law Developments*, 391 (3d ed. 1992) (*per se* rule applied "in extreme" circumstances where "the arrangements included essentially all companies in the market and apparently had no redeeming virtues").

to utilize the preferred agencies first, thereby increasing their sales volumes. This provided bidding agencies with the incentive to bid at competitive prices, and to adhere to the Program's non-price quality, insurance and tax features. At a minimum, these constitute "plausible arguments" that the Program was "intended to enhance overall efficiency" and to make the market "more competitive." *Northwest*, 472 U.S. at 294. *Northwest's* rationale applies fully to these facts.

Petitioners' efforts to distinguish *Northwest* ultimately proceed from the faulty premise that the *per se* rule applies unless the Program is indistinguishable from activity that has been found to require rule of reason analysis. This reverses the appropriate analysis. Rule of reason analysis is presumed. That presumption is overcome only where experience shows that the conduct is a naked restraint of trade, having no potential or capacity to increase competition. The presence of plausible procompetitive features precludes *per se* condemnation, unless there is at least a threshold showing of market power or exclusive control over a resource essential to competition. *See, e.g., BMI*, 441 U.S. at 19-20 (literal "price fixing" more appropriately reviewed under rule of reason where not a naked restraint with no purpose except to stifle competition); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (rejecting *per se* boycott "pigeonhole"). Without proof of a relevant market, Petitioners could not show either that the Program warranted *per se* condemnation or that the Program had the anticompetitive effects necessary to a finding of illegality under the rule of reason.

In all three of their "Questions Presented", Petitioners suggest that *per se* violations occurred when the Hospitals combined " . . . to jointly *force* each chosen agency to agree not to raise its prices for the next year and to offer identical prices to all participating hospitals . . . ." This "forcing" was the alleged work of "almost all competing hospitals in Palm Beach County" (Question I) or "a combination of competing hospitals (with yet other parties)." (Questions II and III). Petition, page i (emphasis added).

"Forcing", in the antitrust context, means market power; that is, the " . . . special ability . . . to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital Dist. v. Hyde*, 466 U.S. 2, 13-14 (1984). *See Northwest*, 472 U.S. at 296. Petitioners failed to prove what their questions suggest: that hospitals in a **defined market** jointly exercised **market power**. There was, therefore, no basis for a finding below that the Hospitals "forced" anything.

II. THE ELEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH, AND ADVANCES, PUBLIC ANTITRUST POLICY AS ANNOUNCED BY DECISIONS OF THIS COURT

Petitioners' various public policy arguments each stem from their insistence that the Program is not a group buying arrangement. Petitioners' warnings about the proliferation of "yet-cleverer price fixing schemes" are therefore unfounded. The same flaw infects Petitioners' effort to demonstrate conflict between the Eleventh Circuit's decision and *National Macaroni Manufacturers Association*

v. FTC, 345 F.2d 421 (7th Cir. 1965). In that case, the Seventh Circuit found that the major U.S. manufacturers of macaroni products had engaged in price fixing by entering into an agreement that was intended to ward off price competition for durum wheat in short supply. They did this by agreeing to use a blend of fifty-percent premium durum wheat and fifty-percent inferior farina wheat. The objective was to lower total industry demand for durum to the level of the available supply. The Seventh Circuit held that since the macaroni industry was the only market for durum wheat, and since the parties to the agreement dominated the domestic industry, the output restriction was *per se* illegal price fixing. However, the Court added an important caveat:

> It seems appropriate to note here that, in the instant case, Commission did not hold "that all efforts at product standardization, or all buying agencies or other cooperative buying arrangements, or all attempts to cope with scarcity or other conditions of economic dislocation, are unlawful under the antitrust laws."

345 F.2d at 427.

The Program bears no material resemblance to the output restriction that faced the Seventh Circuit thirty-four years ago. Most importantly, there was no output restriction: There was no agreement as to the quantity, quality or personnel mix (RN's versus LPN's, for example) of nursing services any of them would purchase or provide. In fact, it was undisputed that the Hospitals were engaged in vigorous head to head competition for patients, in general, and managed care contracts in particular. In the absence of a finding of market power, any

attempt at an output restriction was preordained to fail. The Program, therefore, could not and did not fix prices by limiting demand to meet supply. There is no decisional conflict of any kind.

In a similar vein, Petitioners argue that reversal is mandated by *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). But neither decision dealt with conduct analogous to the Program. In *Palmer*, sellers of bar exam review courses engaged in a horizontal territorial market allocation that had ended, by agreement, their historic competition for law student customers. Prices tripled immediately. In *Superior Court*, an association of trial lawyers engaged in the ultimate output restriction: they went on strike. Specifically, they agreed on a fee schedule and jointly refused appointment as defense counsel until the government met their demands. This was pure price fixing, enforced by a boycott. In both cases, the competitors intended that their joint output restrictions would lead to higher **consumer** prices.

The Program presented the Eleventh Circuit with no such behavior. Hospitals remained in vigorous, no-holds barred competition for consumers; i.e., patients. The Program was related to purchases of an input, and absent a collusive exercise of market power in reselling that input, consumer injury could not be presumed. This Court has only approved *per se* condemnation of those practices that experience has shown to be consistently inimical to consumers' interests in competition. *See State Oil Co. v. Kahn*, 522 U.S. 3 (1997) (vertical price fixing subject to rule of reason analysis because price ceilings can benefit consumers).

A. The Eleventh Circuit Neither Misconceived Nor Misapplied The Law Applicable To Horizontal Price Fixing

Petitioners argue that the Eleventh Circuit repeated its error in *Palmer* by categorizing the Program as group buying instead of a *per se* unlawful price fixing agreement. They premise this on a passage from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 191 (1940) stating that, "combinations formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing" price are illegal *per se*. *Id.*, at 223. In Petitioners' view, this "broadly encompasses" any horizontal activity that has any effect on price. The Eleventh Circuit erred, they add, by "misconstruing that breadth" as the Program's one-year supply contracts "stabilized" prices within *Socony-Vacuum's* rationale.

A review of *Socony-Vacuum*, however, reveals this argument to be unfounded. Competing oil companies agreed to purchase surplus gasoline on the spot market to eliminate that supply as a market factor. These purchases created a price floor that allowed the companies to maintain and raise their own prices to customers. *Id.*, at 191. This Court found the conduct unlawful *per se*:

> Prices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. . . .

Id., at 222-23.

The *Socony-Vacuum* agreement sought to prevent high supply and low demand from causing consumer prices to fall. In contrast, the Program used competitive bidding mechanisms to set the price of an input, with the hope that the offer of increased volumes would increase the competitive pressure to bid lower prices and to meet non-price quality and legal standards. The Hospitals never agreed on a specific price level, price range, or maximum or minimum prices, nor did they agree to restrict or limit any aspect of their competition for patients. Obviously, any supply contract "stabilizes" price for its term. This, of course, presents no antitrust concern as market forces set the price. Group buying creates no different or greater concern unless the buyers collectively possess market power or control over a resource necessary for competition. For example, two small buyers in a market that included many larger buyers could not illegally "stabilize" price by pooling their wholesale purchases through joint one-year supply contracts. Given Petitioners' failure to prove a relevant market, the analysis here must be the same.

B. The Eleventh Circuit Did Not "Misapply" *BMI*

Petitioners argue that the Eleventh Circuit "misapplied" *BMI* because its "exception" to *per se* illegality applies only in "exceedingly narrow circumstances" where the price fixing is necessary if the product is to be offered at all. They add that the Eleventh Circuit repeatedly invoked *BMI* "not for its narrowness, but instead as purported precedent for exempting almost any price-fixing scheme." Petition at 24. This does not fairly

describe the Eleventh Circuit's analysis. *BMI* was cited for the fundamental principle that application of the *per se* rule "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.'" [Pet. App. at 13, citing *BMI*, 441 U.S. at 9].

> Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints.

[Pet. App. at 14, citing *BMI*, 441 U.S. at 23].

Tellingly, *BMI* includes cooperative buying arrangements as among those activities that are "designed to increase economic efficiency and render markets more, rather than less, competitive." 441 U.S. at 20. Similarly, this Court quoted its *BMI* decision in rejecting *per se* condemnation of the *Northwest* buying cooperative, even though it was, literally, a horizontal agreement that affected price and excluded some competitors. *Northwest*, 472 U.S. at 295, citing *BMI*, *supra*, 441 U.S. at 20. The Eleventh Circuit correctly apprehended and properly applied this analysis in declining to apply the *per se* rule to the Program.[5] Given this Court's identical treatment of

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[5] Nor did the Eleventh Circuit "ignore" its holding in *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986). The court, citing *BMI*, considered whether an "Issuer's Reimbursement Fee" charged by the VISA credit card system was *per se* illegal because it constituted literal price fixing. The issue framed was "whether the practice, on its face, always or almost always tends to restrict output or instead is likely to assist in the creation of economic efficiency." *Id.* at 603. The court applied the rule of reason because it found the arrangement to be a procompetitive "mechanism by which

the *BMI* holding in *Northwest*, Petitioners' alarm over the Eleventh Circuit's decision is misplaced.

C. The Eleventh Circuit Did Not Misapprehend The Program's Horizontal And Vertical Components

In a footnote, the Eleventh Circuit observed that the Hospitals' "alleged attempt to fix prices" by "agreement with each other would be horizontal – an agreement between competitors." [Pet. App. at 15, n. 14]. The court then analyzed the implications of a horizontal combination of buyers without market power that "stabilized" prices through joint one-year supply contracts. [Pet. App. at 15]. It rejected Petitioners' effort to categorize the Program as *per se* price fixing on this basis.

In the same footnote, the Court observed that the Program had a vertical component: each hospital signed a separate supply contract with each preferred agency. Petitioners also insisted that this activity was *per se* illegal price fixing, and they continue to pursue that charge against High Tech to this day. It was, therefore, more than appropriate for the court to observe that the contracts with preferred agencies were vertical and subject to the rule of reason. *State Oil Co. v. Kahn, supra.*

VISA ensures the universality of its card, not a price fixing device to squeeze out entrepreneurs." *Id.* at 602.

D. The Program Constituted Procompetitive Group Buying

This issue is dealt with above. Respondents add that the Department of Justice's and FTC's joint "Statements of Antitrust Enforcement in Health Care" of August 1996 that Petitioners cite[6] actually contradict their *per se* arguments. The statements simply echo this Court's holding in *Northwest* that joint purchasing arrangements are unlikely to raise antitrust concerns absent market power or purchase volumes so large that they may facilitate price fixing or otherwise reduce competition. Either circumstance requires market analysis. Moreover, the footnote Petitioners cite would apply the *per se* rule only to an "agreement among purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product." The Hospitals made no such agreement. They signed contracts at prices bid by the sellers.

III. THE ELEVENTH CIRCUIT CORRECTLY CONSIDERED AND REJECTED PETITIONERS' CONTENTION THAT THE PROGRAM WAS A *PER SE* ILLEGAL GROUP BOYCOTT

In pressing their boycott theory, Petitioners attempt to distinguish *Northwest* in favor of *Superior Court*. The latter case, they contend, holds that "a boycott in furtherance of horizontal price fixing is *per se* unlawful." But *Superior Court's* rationale renders it inapplicable to the Program:

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[6] Petition at 26, n. 18, citing 4 Trade Reg. Rep. (CCH) ¶ 13,153, p. 20, 812, n. 17.

> The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented **by a concerted refusal to serve an important customer** in the market for legal services and, indeed, **the only customer** in the market for the particular services that CJA regulars offered. "This **constriction of supply is the essence of 'price-fixing,'** whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."

FTC v. Superior Court Trial Lawyers Association, 493 U.S. at 423 (emphasis added). In contrast, the Program featured competitive bidding open to all agencies, no refusal to sell, no output restriction and no collusion of any kind in competition for customers. [See App. 34-35] *Per se* condemnation is therefore precluded.

IV. NO APPLICABLE PRECEDENT EXCUSES PETITIONERS' FAILURE TO PROVE A RELEVANT MARKET

Petitioners note that in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1985), this Court indicated that formal analysis of the relevant market is, in some limited circumstances, unnecessary to assess market power. In both cases, the Court found *per se* analysis to be inappropriate, but found the restraints unlawful under the rule of reason without formal analysis of the relevant market. The Court did so because the respondents had presented no credible "competitive justifications" for their naked restraints on price,

output and service. *NCAA*, 468 U.S. at 101, 109-110; *Indiana Fed'n*, 476 U.S. at 458-60.

In contrast, procompetitive justifications are normally attendant to group purchasing arrangements; thus, those arrangements must be analyzed in the context of a relevant market. *Northwest*, 472 U.S. at 295-98. Nor does the present record support application of the caveat that " 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power." *Indiana Fed'n*, 476 U.S. at 460-61 (*quoting* 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986)). Those effects were apparent in *Indiana Fed'n* because of the naked restraint on output – insurers were unable to obtain compliance with their requests for x-rays over a period of years. *Indiana Fed'n*, 476 U.S. at 460. Here, Petitioners' failed to offer evidence that **consumers** of hospital services were harmed in any way by the Program. This precludes a finding of actual detrimental effects sufficient to obviate market definition.[7]

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[7] *See Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1569 n. 15 (10th Cir. 1991) (1992) (need proof that "consumer choices were in fact reduced or impaired"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-30 (1984); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992) ("reshuffling of competitors" does not constitute actual detrimental effects).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

EXCERPTS OF TESTIMONY

* * *

[p. 174] Q. He was doing everything he could to try and keep this hospital from going out of business, right?

A. Correct.

Q. The hospital, I guess, was competing with the other hospitals in the area?

A. Correct.

Q. And two of them weren't going to make it; that was the fear in 1988, right?

A. That was the theory.

Q. And Peter Faron acted to make sure that his hospital, the one he was given responsibility for wasn't one of the hospitals that went out of [p. 175] business, correct?

A. Correct.

* * *

[p. 4279] Q. All right. Then the next column, what does that mean?

A. That's the number of acute care bed hospitals that existed during each of those years in Palm Beach County. And as you can see, there were always 15 hospitals in each and every one of those years.

Q. All right. Then the next column sir, total acute care beds?

A. That's the number of beds made available for acute care by hospitals in each one of those years except the year 1990. And I'm prepared to tell you that that number is the same as the [p. 4280] earlier year, 3198.

Q. All right, sir. And then the last column average occupancy rate, what does that mean?

A. That measures how frequently those beds are being used and how long the patients are staying and what we call kind of a combination of patient days. And it shows that while there were 3212 beds in 1988, the – and the average occupancy rate was 54.8 percent of the time, that by the year 1992 there were 3186 beds, a slight decrease in the number of beds, and that the average occupancy rate had, in fact, slightly fallen to 53.1.

* * *

[p. 4582] On the other hand, the hospitals are operating under the constraints of regulation. We're all I think familiar with the problems, the issues involved in health care including the fact that Medicare, Medicaid, Hmo's, Blue Cross/blue Shield all make some dictates that regulate how much hospitals can be reimbursed for particular sorts of care. And within Florida we also have the Cost Containment Board that is operating to put a further constraint on what hospitals can do –

Q. And when you say –

A. – in terms of pricing.

Q. So are you saying there's some limit on the ability of hospitals to raise their charges to patients?

A. Sure, there's some limit on hospital's flexibility in, quote, passing on the additional costs of carrying out this program to, to patients.

* * *

[p. 1279] Now, what Medicare did, they had over 400 classifications of diagnosis, and they came up with this rather complexion rate that capitated.

What they did is they paid hospitals for, say, an appendectomy a flat amount of money. "How much do you get for the appendectomy?"

So if a person came into the hospital and stayed for a week for an appendectomy, the hospital would lose money.

If the person were able to get out of the hospital sooner than that, then the hospital was able to provide that service for a lower cost and would actually make money.

Now – okay.

Q. As far as, as far as the Medicare requirements, are they adjusted in any way considering the cost to the hospital for services such as temporary nursing services?

A. Well, no, they are not.

What they do is they take, take a regional, they use national data and they include salaries, nursing salaries in that, but they use regional data also among hospitals. And if the – whatever the average regional is is what they would [p. 1280] reflect into this, this diagnostic rate that they would give the hospital. But if a hospital spends a

lot more money for temporary nurses, they don't include that.

* * *

[p. 1347] Q. The whole trend in the market now means that fewer and fewer and fewer patients come to the hospital as individual private insureds, correct?

A. As private insured patients it's lower [p. 1348] that's correct.

* * *

[p. 64] You are aware, are you not, that hospitals sign contracts with HMOS and PPOS that obligate them to a certain price for a one-year period of time, correct?

A. Yes.

Q. So hospitals' revenues from which they pay nurses are locked in or stabilized for that period of time, right?

A. Right.

Q. Okay. And when a hospital signs a contract with an agency and the agency agrees to charge that price for one year, that price is locked in or stabilized in the same sense, correct?

A. Right.

* * *

[p. 397] "A. The concern of the hospitals were that the hospitals essentially have to operate on a fixed reimbursement system that's dictated by the federal government and by contractual arrangements in preferred

provider organizations. And so if your temporary nursing services are going up, prices are going up every month, it's kind of hard to operate your business if you don't know what the prices of your input's going to be next week. You can't plan and operate and provide services that a hospital is supposed to provide in that kind of environment.

* * *

[p. 3891] A. There were nurses that certainly preferred to work only in hospitals. But, in general, if push came to shove, the nurses would work wherever, if they wanted to work, would work where the work was available.

[p. 3892] Q. And what would that include?

A. Everything: nursing homes, private duty, home care, doctor's offices. Just . . .

* * *

[p. 3903] Q. Now, let me ask you, sir, to what do you attribute the decrease in High Tech Staffing Services by a factor of 75 percent over the 1989 to 1995 period?

A. Oh, a number of things happened. One is, well, I just mentioned, that the hospitals have been releasing the patients earlier because of the DRG's, and so we're getting sicker clients. Actually, every state in the Union for the last five years or so there's been an increase in home health visits per Medicare beneficiary which means that, you know, hospitals nationwide are, are releasing patients earlier.

The second thing I think that happened was the recession. And as a consequence, some nurses who were at home came back into the work force, so that alleviated the shortage a bit.

* * *

[p. 47] Q. What has happened in the area of shortage of nursing services in Florida since the shortage we've described in 1988, if you know, up to the present time?

A. Well, the shortage has decreased. I think that's fairly common knowledge. And in Florida it's about seven to eight percent. Figures for the rest of the country are like four to five percent. So it's a little bit higher here, but it's not critical.

* * *

[p. 5877] By a separate statute governing nursing homes in the State of Florida, and effective between 1994 and 1989, the state required that any person other than an RN or an LPN who serves as a nursing assistant in a nursing home must be certified by the state. This requirement does not apply to hospitals.

To qualify for a nursing assistant certificate, a person must have received at least a score of 75 percent on the state certification examination, which was a test approved by the Department of Education or successfully completed a nursing assistant program in a state-approved school.

* * *

[p. 3889] One of the problems with the hospitals are they are very seasonal. And like for every nurse that you place during the low season, you could place three nurses during the high season. And between, the delta or differential between the [p. 3890] lowest part of low season and the highest part of high season may be seven nurses placed in high season for every nurse that's placed in low season.

* * *

[p. 3890] When we serve the hospitals during the high season, we had to balance the customers, that is, we couldn't take all the nurses from the nursing homes because then the nursing homes wouldn't use us during the low season and we obviously couldn't take away all the private duty or home care nurses because then the patients would get sicker or whatever. So there was always a balancing act.

* * *

[p. 2531] Q. And would there be – well, would that planning then extend evenly throughout the year?

[p. 2532] A. No. There would be, there's a phenomenon in South Florida where there are seasons, what we call season, which generally for us we define as December through March or April, and there would be a peak activity in that time.

So what you endeavor to do in your budgeting process was look at what core staff you would need during the nonseason times and maintain your full-time and part-time staff at that level. Then you would look at, for instance, if a unit average daily census would be 8 but

you knew in the peak time it could go up to 16, you would look at how you would meet that challenge, that need to increase the staff for a short interval of time. Therefore, you would utilize the contracts of assignment, the travel agency nurses as well as the temporary nursing agencies to fulfill that need.

* * *

[p. 2534] Q. Now, within those budget constraints did you then – were you able throughout your time period to meet the seasonal fluctuations that you discussed?

A. It was a challenge, a special challenge, I think staffing was.

We would try to predict what our average increase in activity would be for the season and utilize travel nurses or contracts of assignment because that was, that was a known. We knew we may not be 16 patients every day, but we would surely get to 12. So we would take contracts of assignment and travel nurse contracts for that [p. 2535] component and then we would try to remain more flexible with the temporary nursing agencies.

* * *

[p. 3982] "A. My number one problem is the thought of people coming into my institution, providing patient care services, that have never ever been in my doors before. The responsibility that I feel I have to patients is inconsistent with letting that happen. And, unfortunately, that is, that is a reality. You know, being up there on a nursing unit unfamiliar with what's going to happen with me as patient, knowing that the person

caring for you has but five minutes before walked in those doors, to me must be a frightening experience. I have never had it.

"In terms of the potential that could happen in that situation, and from the lack of orientation, the lack of knowledge, the lack of understanding about our particular [p. 3983] hospital, to me just is unlimited. That was very frustrating. Not knowing the individuals, not having a lot of history with the agencies, not having a lot of knowledge firsthand early on, that was extremely frustrating for me, yes.

* * *

[p. 1591] Q. Now, tell the jury, if you please, ma'am what was your gross margin when you sold nursing services to a hospital. How much did you mark up what you were paying the nurse?

A. Over what we paid the nurse?

Q. Yes, ma'am. Your gross margin.

A. I think that we worked at about 30 percent.

Q. So –

A. I believe.

Q. So if you paid the nurse $20 –

A. Right.

Q. – you charged the hospital roughly $30 an hour.

A. Right.

Q. And that $10 an hour didn't go to the nurse; it went to Pdq Nurse, Inc. for overhead and for profit, correct?

A. That's correct.

* * *

[p. 1880] Q. So that's a very small agency, isn't it, ma'am?

What you had was you and some people that you'd known and you left your jobs in hospitals and you started working through your agency, is that a fair characterization?

A. That's how we began, yes.

* * *

[p. 809] Q. So in the effort to open up the blood vessels and take the pain away from the heart, blood pressure can drop?

A. Right.

Q. And am I right when that happens a patient can suddenly lose consciousness?

[p. 810] A. Can.

Q. State to breathe laboriously?

A. Can.

Q. And if it's not caught in time, they could die?

A. They could.

Q. And it's a good thing you were there, isn't it?

A. Yes.

Q. You spent your time that night, instead of watching other nurses, watching what an agency nurse was doing?

A. Correct.

Q. And if you hadn't been watching something pretty bad could have happened?

A. It could have.

Q. All right.

Now, was there any mechanism in place for you to get the word out to other hospitals in South Florida to watch out for this nurse if she shows up in the critical care unit?

A. No.

Q. So the next night that nurse could have been somewhere else through High Tech or any other agency she had signed up with?

[p. 811] A. Could have.

Q. And someone else could have had your experience again?

A. Could have.

Q. Now, on the note that you read, if I remember correctly, it says, "I am concerned with the quality of agency." By that did you mean agency nurses in general?

A. Yes.

Q. It wasn't High Tech; it was agency nurses you were concerned with, correct?

A. Right.

* * *

[p. 563] Q. Okay. Have you ever heard the phrase phantom booking?

A. Yes.

Q. Tell the jury what that is, please.

A. Hospitals would request an individual, and some of the nursing agencies would put somebody's name in that you had requested, and someone would show up in their place.

* * *

[p. 2667] A. I think we use those, phantom and blind [p. 2668] booking, interchangeably.

Q. I see. So it was a situation where if you had requested previous nurse Jones and nurse Smith shows up, that was a concern?

A. No. It wasn't a request at all. It was the agency – we would tell the agency we needed a nurse to work in such and thus area on this particular shift. They would either tell us then or call us back with a name. And that could be anywhere from two weeks to four weeks ahead of time. And that day arrives and it's an hour before the shift, and that nurse can't come, and you get another name or you just get a cancellation; they can't fill the shift at all.

* * *

[p. 484] Q. Prior to that time did Florida Nurses Network offer nurses in either/or both formats, that is employer/employee or independent contractor?

A. We went to an employer/employee relationship at that time.

Q. Okay. And had you set the rates for your employer/employee nurses according to what you felt was appropriate in the market to be competitive at that time?

A. Yes, I did.

Q. What effect did it have on your rates to go to an employer/employee relationship?

A. Of course, it increased your rates because you have more fringe benefits.

Q. What kinds of things would go into that format that caused the rates to go up?

A. Income tax, workmen's compensation, your liability insurances. All those things impacted the rates.

* * *

[p. 3978] "Q. Okay. You mentioned you had some concerns regarding how the Irs might treat [p. 3979] independent contractors?

"A. Uh huh." Affirmative.

"Q. Do I understand that to mean that you had a concern that perhaps the Irs might look to the hospital in some way for unpaid taxes of nurses?

"A. That's correct.

"Q. Okay. When you mentioned workmen's compensation or workers' compensation, do I understand correctly that you had a concern that if a nurse was injured on the job, that maybe the hospital might get named as the employer?

"A. Actually what spurred that was an incident.

"Q. Okay.

"A. And so I have some first-hand knowledge of that.

"Q. Okay.

"A. But, you know, your scenario is true. I am not sure that I was clear at that time as to who would be responsible.

"Q. Okay. And would I be correct also that another one of your concerns was that if a nurse wasn't properly covered with [p. 3980] malpractice insurance, that perhaps the hospital might have to pay a greater amount than its share if a judge or a jury decided that someone was negligent, specifically that the nurse was negligent?

"A. That's true.

* * *

[p. 2651] Q. Are you aware during the time period 1983 to '84 when you first started doing business with Qpn at Bethesda in August, mid August of 1988, are you aware of a single other document evidencing problems that you had with Quality Professional Nursing? Are you aware?

A. I can't recall any specific documents. I just know about the trend of doing business with agencies.

Q. Isn't it a fact, ma'am, that the real significance of this document in this case is that having a problem that was worth making a document over with Quality Professional Nursing over the years you did business with them, was so unusual, so exceptional, that this is the only one that stands out? Isn't that the real significance?

A. The real significance is the fact that the services of Quality Professional Nursing deteriorated. And what prior to this we could rectify with a conversation, we felt we couldn't, and we needed to take the next step and document it [p. 2652] in writing.

* * *

[p. 3222] "Q. And your pay slips reflected that you were working for All Care?

"A. All Care Nursing Services.

"Q. All right. Do you know what a medicine test is?

"A. Um-hum.

"Q. All right. Would you tell me what that is?

"A. Well, it's to test your knowledge on dosage, medications, the interactions of medications, the actions of medications to see if you know what you're doing once you're giving medications to a person.

"Q. Okay. And did you ever have the occasion to take a medicine test when you arrived here in Florida?

"A. Yes.

"Q. And would you tell me the [p. 3223] circumstances around that?

"A. Well, Julie kept asking Jim and I to go to Bethesda, go to Bethesda, take the test and go to Bethesda and –

"Q. That would be Bethesda?

"A. General hospital?

"Q. Okay.

"A. On Seacrest Boulevard there.

Bethesda Memorial?

"Q. Okay.

"A. Whatever.

So Julie said to Debbie, 'Give them a copy of the test,' which Debbie did. She gave us a copy of the test for Bethesda and one for Pinecrest and on this test were written the answers.

In fact, I have the test. I still have it.

And she said, you know, 'Read this and then go down and take the test.'

Well, the night before we took the test we were working eleven to seven at one of the nursing homes somewhere, I forgot where it was. So we did go and take the test the next morning.

[p. 3224] Well, apparently that afternoon somebody had called Debbie and said that Jim and I both had failed this test."

"Q. Someone had called from where? I'm sorry.

"A. From Bethesda, okay?"

"Q. Go ahead and answer.

"A. Bethesda test, you know.

So Bethesda called All Care, apparently. Now, who they talked to, I have no idea, but Debbie told me that Jim and I both failed the test.

"Q. Okay.

"A. So I said, 'Well, I don't understand that, you know. I mean, I had the answers. How could I have failed the test?'.

So I called the DON down there, I think she was the DON or the nurse manager, and asked to come down and talk to her to see the test, I was curious, which was my right.

[p. 3225] So I went down. She was a very nice person, very loving person. She had my test there. And I looked and I said to her, 'Well, they are right, aren't they?' And they weren't because what apparently had happened, they had moved decimal points. The answers were nearly the same. The only thing that was changed was like a decimal point. And if you didn't look at the test thoroughly and just marked the answers down, it was the same as the one that Debbie had given me.

So I went back to the office and I talked with Debbie and I told Debbie about the test, and she said, 'You're kidding." I said, 'No. I'm not.' I said, 'They have changed the test whereas you don't even recognize it if you just

went in there and wrote the answers down from the sheet that you gave me.' "

* * *

[p. 3264] Q. What exactly do you sign? What piece of paper?

A. If it's a medication, it's their med sheet, a MAR, M-A-R. You sign your name and then on the date and the time you initial.

Q. All right. And is it customary or are you required when you sign the med sheets or the chart to indicate that are you an Lpn?

A. Yes.

Q. Was that a practice that you had when you filled shifts at nursing homes?

A. Yes.

Q. All right.

Now, if you would, please, turn to the second page and tell us – Defendants' Exhibit 1551 – tell us, please, the facility, the date, the time and the capacity in which you filled that shift.

A. Regents Park, December the 19th, 1987, 11:00 p. m. to 8:30 a. m. in the morning and I signed as an Rn.

Q. Now, were you ever an Rn?

[p. 3265] A. No.

Q. Why did you do that?

A. Because I was asked to.

Q. Who asked you to do that?

A. Julie Monahan.

Q. Can you describe for us as best you can that conversation?

A. She just, she needed an Rn in this facility and there apparently wasn't any available, and she convinced me that I was a good enough nurse to do this and that it wouldn't be a problem, it would just be routine and would I please go, and I did.

* * *

[p. 249] Q. Before the preferred provider program took effect at Palms West Hospital do you have any understanding as to what was happening in the marketplace with regard to the prices that temp nursing agencies were charging? Were they changing?

[p. 250] A. The main problem with agencies at the time is they had no conscience for price. They increased their prices at will at any time. They would give you a notice that they were increasing them sometimes extremely high. Every three months we could get a price raise and every three months somebody else would do the same thing.

* * *

[p. 2572] Q. And did you attempt to address those trends through unilateral contracts between Bethesda and the agency?

Mr. Powers: Objection. Leading.

The Court: Objection overruled.

The Witness: Yes, we did.

By Mr. Diesenhaus:

Q. Do you feel you were successful in those attempts?

A. No, I feel we were not successful in [p. 2573] those attempts.

Q. Why do you feel you were not successful?

A. The agencies were still engaging in phantom booking, they were still sending us people who were not qualified, we were still having problems with agency staff. And year after year when we negotiated contracts we tried to increase, refine our quality assurance measures, but they seemed to be to no avail. We still would be left with the disruption of having an agency nurse booked and having her canceled at the last moment and having to rearrange a half hour before a shift would start and patient assignments would already be made, we would have to rearrange the assignment of that particular unit which would most often have a domino effect on other units because you had to redistribute the expertise and relook at it.

And we tried to develop a penalty for agencies canceling nurses two hours prior to a shift. That still did not help this.

* * *

[p. 118] "Q. Now, let's today a look at number [p. 119], hiring and recruitment of hospital/agency personnel, in caps and underlined. Because of the relationship between each association member, referred to below as a hospital, and its nursing personnel, and the time, effort and cost involved in recruiting and training nursing personnel, the following paragraph is set forth herein and must be part of any contract that results from this request for proposal:

"Quote, recognizing, one, the special nature of the relationship existing, or which will exist, between the hospital and the nursing personnel which it employees, and, two, that the recruiting and training of personnel by the hospital is a costly and time-consuming endeavor, the agency agrees that it will not, during the terms or any renewals hereof, or for a period of six months following termination of this agreement, directly or indirectly, through any manner or means, impair or initiate any attempt to impair the relationship that exists between the hospital and nursing personnel employed by the hospital through offers of employment, offers of [p. 120] contracts for services to be rendered by such personnel, offers to arrange permanent or temporary, full or part-time placement of such personnel at hospitals or other health care providers, or otherwise; provided that the agency shall not be prohibited from employing nursing personnel who solicit such employment otherwise than as a result of agency action described in the preceding clause, unquote.

[p. 2955] Q. All right.

Now, do you recall whether the bidding that was called for was for a term of one year?

A. Yes, it was for one year.

* * *

[p. 127] "Q. What was the intended use of this two percent gross dollar volume? What was the purpose?

"A. The purpose of this was to pay for services in the management of the program or the administration of the program.

"Q. Such as?

"A. Such as a staff person to work as a liaison between the hospitals and the agencies and then it would cover travel expenses and so forth back and forth.

* * *

[p. 2685] Q. Now, what did you understand at the time you were being interviewed, what did you understand to be the nature of the position of nurse liaison? What were you supposed to accomplish?

A. My understanding was that they were looking for a coordinator, a liaison between the two groups that would deal with issues in regards to the qualifications of the nurses, the scheduling, the communication problems, so to speak, a trouble shooter.

* * *

[p. 2776] Q. Someone from another hospital or other hospitals you competed with made a decision about whether from your hospital's standpoint Qpn would or would not be a preferred agency; is this true?

A. There was a group of people out of our administrative group, there was a committee chosen to review the

documents that had been sent in. That committee made the decision.

Q. That committee did not have anybody from Palms West on it when it made the decision?

A. No, sir.

Q. Correct?

A. No, sir, it did not.

* * *

[p. 354] "Q. And it says, 'Chandler Bailey reviewed the bids received form the various nursing agencies. 16 bids were received. Letters of intent to bid were received from two other agencies.'

Do you recall which agencies the other two were?

"A. The other two? I recall one. I can't remember the name of the other one.

* * *

[p. 3567] Q. Okay, Ma'am. That's fine.

[p. 3568] Now, let me ask you, please, if you'll turn the page to page 13 and tell the jury, if you will, what it says, tell the jury, please, how much All Care bid to supply a registered nurse medical/surgical on the day shift seven to three on Monday through Friday.

A. $36.

Q. All right, sir.

A. This was done by a travel company and she included apartments in there. She didn't know not to do that.

Q. All right. Let me ask you, ma'am, if you would look, please, at Plaintiffs' Exhibit 1873 –

A. I think that's what she was doing. I can't speak for Debbie, really.

Q. Let me ask you to look at Defendants' Exhibit 1873 and let me ask you, if you will, to read the bid of Nurses Prn for Rn medical/surgical for the seven to three shift.

[p. 3569] A. 25.50.

* * *

[p. 2959] Q. Well, how big a factor was it? How important a factor was price in the selection of the preferred agencies?

A. Well, as I said before, we were hoping that the price would come down based on volume. But what happened, if I recall correctly, is that some of the agencies' prices were even higher than what they currently were providing nurses to the hospitals for, and I don't think that really was the deciding factor in the decision of what [p. 2960] agencies we chose.

* * *

[p. 3896] Q. What options, as you understand it, would High Tech have for the one-year term of the contract with respect to what it paid nurses during the term of the contract?

A. We could have increased their pay. We could have decreased it. We had the 30-day termination clause so that if the pay of nurses by the nonpreferred agencies greatly exceeded what we were able to pay, we could

have dropped out of the program. We felt relatively comfortable in terms of our position.

* * *

[p. 3137] "Q. Did you, in fact, submit a second bid with lower prices after receiving this letter from South Florida Hospital Association?

"A. No, we did not.

* * *

[p. 2246] Q. Give me just a moment, sir.

All right. Let's do it like this to save time.

Let me ask you to assume that Mr. Miller wrote back to Chandler Bailey, questioned the bone fides of the program, questioned severely whether they really cared at all about quality, accused them of caring only about price and told them, "I can't lower my rates. You've raised my costs," and then the South Florida – he refused to rebid, kept his prices higher than they were, and the South Florida Hospital Association or the Hospitals said, "Okay. You're preferred."

I take it that doesn't change your [p. 2247] opinion, does it?

A. Well, it is surprising, isn't it.

* * *

[p. 2958] Q. Okay.

Now, do you recall at this point in time exactly why certain agencies were selected and others were not?

A. (No response).

Q. And with that question I mean agency by [p. 2959] agency.

Do you remember what you thought about each of the specific agencies?

A. I don't remember details.

Q. Okay. What do you remember generally about?

A. I remember generally, as I indicated before, the availability of nurses, what part of the county the agencies were located in, what hospitals they currently serviced, their reputation, their willingness to make the nurses employees of the agency. I don't really remember a whole lot else.

Q. What about the price?

A. That was also a factor.

Q. Well, how big a factor was it? How important a factor was price in the selection of the preferred agencies?

A. Well, as I said before, we were hoping that the price would come down based on volume. But what happened, if I recall correctly, is that some of the agencies' prices were even higher than what they currently were providing nurses to the hospitals for, and I don't think that really was the deciding factor in the decision of what agencies we chose.

* * *

[p. 515] Q. Excuse me. I think I have the wrong letter. No. No.

Well, let me ask you this: Do you remember if the letter you are referring to expressed disappointment that

the initial bids that the agency received from, the South Florida Hospital Association received from the agencies, do you remember if it expressed disappointment that those prices or rates were higher than the hospitals had been paying?

A. Yes.

Q. Did that cause you to conclude that all they were caring about was price?

A. It appeared that way.

Q. They didn't care about quality, they didn't care about standards, they just wanted a lower price?

A. Right.

Q. And I think you said that you were the lowest cost bidder?

A. Yes.

Q. You went to the agency – let's clear that up – at your own request?

A. Uh huh.

[p. 516] Q. You asked them if you could see what the other agencies had bid, right?

A. Correct.

Q. You wanted to know that so you could tell if you should maybe adjust your bid and get into the negotiation better, right?

A. Uh huh.

Q. And you were the lowest cost bidder, correct?

A. Correct.

Q. And you weren't selected?

A. No.

Q. Did you know that they selected agencies, eight of them, whose bids were all higher than yours?

A. I had heard that.

Q. It is inconsistent, isn't it, that all they cared about was price, isn't it?

A. Correct.

* * *

[p. 1176] Q. Were you aware of whether all eight of the preferred agencies bid the same prices?

A. That we all bid the same?

Q. Yeah. Do you know whether you did or not? Did you ever get a chance to look at the bid sheets?

A. There was a time that we could go up there and look at them.

Q. Did you do that?

[p. 1177] A. Yes.

Q. Do you remember seeing if there were differences in price?

A. I think, yeah, there was.

* * *

[p. 2587] Q. Now, focusing again on the period during the preferred provider program, for those preferred

agencies with which you dealt do you have a sense of how their prices changed from the time just prior to the preferred provider program and the time during the preferred provider program?

A. Yes. The price went up.

* * *

[p. 1166] Q. Did you conclude that your nurses were getting a raise as a result of your having been made a preferred provider?

Mr. Powers: Objection, your honor. Beyond the scope.

The Court: Objection overruled.

By Mr. Allen:

Q. Go ahead.

A. That's how we were trying to look at it, yes. We were trying to show that by us paying their payroll taxes or social security that it was going to be more beneficial to them.

* * *

[p. 3899] A. Well, I didn't, I didn't expect anything substantially different than what happened because, as I said, when we, when we found out that there were eight bidders, that meant that there was going to be new competition in hospitals that we were serving. So we tried to go in and again compete for business within those hospitals that were part of the preferred provider program to try and gain market share relative to the other preferred provider agencies.

So that was very similar to what was happening before the program. We were still competing with agencies and, in addition, the hospitals were using a substantial amount of nonpreferred provider agencies. So it wasn't, it wasn't, there was no exclusivity about it. And the [p. 3900] program was in such, in such a, for such a short period of time that there was no, I don't think there was any possibility of any long-term effect and we certainly didn't see any long-term effect.

* * *

[p. 3901] Q. Okay.

Now, tell me, if you will, how the High Tech companies have changed, if they have, [p. 3902] since 1989.

A. Well, the staffing business has basically gone away. We were doing about a little over 2 million dollars in a year in 1988 in hospital and nursing home staffing and we're now doing about a half a million dollars a year. So that's gone down by a factor of 75 percent.

On the other hand, the private duty business, we're doing about 2.2 million dollars out of Private Care and we did, last year in 1994 we did 60,000 Medicare visits for a gross revenue of around 3 and a half million dollars.

So I think we're up to about, if I count that correctly, about 6 million to 6 and a half million dollars in revenues now. Very little of it is staffing.

* * *

[p. 774] Q. And you have made it in home care as an agency through talent, skill, management, recognizing your opportunities?

A. We are successful.

Q. And you are successful at it, aren't you?

A. Yeah, we are.

Q. Now, you said that today, something like this, and correct me if I misstated, you said staffing is down and everything is home care?

A. No. I said staffing is still there. We don't have the nurses to go there as much as we did in the past. Never will have. And home care is much more prevailing.

* * *

[p. 2703] Q. Okay. Now, in what areas of the country is this true that this trend toward, away from hospital staffing and towards home care has taken place?

A. Throughout the United States.

* * *

[p. 3901] Q. Okay.

Now, tell me, if you will, how the High Tech companies have changed, if they have, [p. 3902] since 1989.

A. Well, the staffing business has basically gone away. We were doing about a little over 2 million dollars in a year in 1988 in hospital and nursing home staffing and we're now doing about a half a million dollars a year. So that's gone down by a factor of 75 percent.

On the other hand, the private duty business, we're doing about 2.2 million dollars out of Private Care and we did, last year in 1994 we did 60,000 Medicare visits for a gross revenue of around 3 and a half million dollars.

So I think we're up to about, if I count that correctly, about 6 million to 6 and a half million dollars in revenues now. Very little of it is staffing.

* * *

[p. 1599] Q. And did you hear him testify that he started his business again, he shifted from hospital staff relief to private duty and home care?

A. Yes.

Q. Did you hear him testify that he thinks his business today is very valuable?

A. Did I hear him testify what?

Q. That – let me start again.

Did you hear him testify last week in this case that because of the preferred provider program, he had to refocus his efforts into private duty and home care?

A. Yes.

Q. And he was able to do that, wasn't he?

A. Yes.

Q. And today his business is very valuable, isn't it?

A. Yes. He said he was back up to two-thirds of what he had made before.

* * *

[p. 1769] As things kept developing that way – and, yes, I will never deny the fact that I went through a massive depressive episode. Because they [p. 1770] killed an identity of who I was and what this agency meant to

me. But I am here today after a great year of regrowth now, talking to you, functioning as a fantastic critical care nurse in Palm Beach County.

* * *

[p. 2249] Q. Sir, have you reached an opinion in this case about how many agencies there had to be out there supplying agency services to hospitals in Palm Beach County in order for supply and demand to [p. 2250] work well enough to reach the equilibrium point, yes or no?

A. I haven't reached an opinion at all about that. That market was competitive before. Entry was easy. Exit was easy. There were 70 agencies altogether.

If you look in the Palm Beach Yellow Pages today, you will still find 60 to 70 agencies being listed. Getting in and supplying that business has not been the problem. It's on the demand side where the problem existed.

* * *

[p. 3940] Again, we were, we were relatively pleased. We had our price increasing as becoming members of the preferred provider program, and if the bid prices for nurses got out of control, we [p. 3941] would have just opted out of the program if we would have needed to do so.

* * *

[p. 2838] Q. Would you read that for us, please?

A. "Eight," in parentheses, the numeral 8, "nursing agencies have been selected as our preferred providers. This was assembled by Palm Beach County nursing

administration with assistance by the South Florida Hospital Association. These eight agencies will be utilized first. If they cannot provide staffing, then we may go to other agencies as needed."

Q. Is that as fair representation as you understood it as to what the preferred provider program was going to do with regard to giving a preference to agencies?

A. Yes, sir.

* * *

[p. 4587] Q. – from an economic perspective is there any reason why the hospitals participating in the program would have an incentive to reduce or eliminate competition among those agencies?

A. Oh, no, they wouldn't have any incentive for two reasons.

In the first place, if you are a monopsony buyer, you're the only purchaser of the product, the one thing that you want to have is as many sellers as possible competing to sell to you so that you get the lowest possible price for the product that, that you buy. It doesn't matter whether you're a monopsony seller or whether you're in a competitive market. You want the greatest number of people competing to sell to you.

[p. 4588] The one thing you don't want to do is take the risk of having only one seller and have that seller now become a monopoly that is selling to you and has got as much power as you have but on the other side of it.

So that's the one thing you don't want to do, in addition to the fact that it's the one thing you couldn't

accomplish anyhow. And you can't accomplish this anyhow because even if you could drive, for some obscure reason you wanted to drive everybody else out of the market, the agencies out of the market, they'd just spring up again because entry into this market is virtually free.

Beyond that, why would the hospitals want to do something like – I mean, why would you want to do this?

The agencies are performing an important service. They are performing that service for the hospitals and they are performing that service for the nurses and ultimately they are performing the services for the consumer. so nobody wants to drive them out of the market.

* * *

[p. 2047] The Court: Okay. Go ahead.

Mr. Allen: Your honor, we will object to the series of exhibits coming into evidence now in two ways. First, we renew our motion to limit or bar the damages testimony which your honor has ruled on and been fully apprised of our position on it. We assume the same ruling, but we want to preserve the record.

Second, your honor, the exhibits that are about to be placed in evidence contain in them a lot of information about these companies' costs and revenues. There is no – there is unsatisfactory or no evidence in the record as a predicate upon which the witness could testify. The documents themselves that would support it are not in evidence. The evidence itself is not in.

Now, I understand that an expert is entitled to rely on matters in forming an opinion that are not admissible in evidence. I don't believe this is that situation. We are going to have instead on the actual evidence an expert's opinion that I have looked through the business records and this [p. 2048] is what they mean. I don't believe that's permissible. These exhibits contain his work, apparently, with documents that are not in evidence in the case. And they are business records of the plaintiffs.

We object to the entry of the damage models that are about to be presented on that basis.

* * *

DEFENDANTS' TRIAL EXHIBIT 32

NURSING PROGRAM LIAISON

POSITION: R.N. Liaison between area hospitals, Preferred Nursing Agency Program member staff and the S.F.H.A.

POSITION SUMMARY: Major areas of responsibility are:

- Meeting regularly with Directors of Nursing of both hospitals and agencies to assess program
- Promote the utilization of the program agencies with hospital staffing coordinator
- Respond to hospital concerns related to "agency nurses", in a timely manner, by:
  * identifying source of the problem
  * collecting data from both the hospital and agency related to the problem
- Assist the hospital and agencies in problem solving activities to rectify the identified problems

- Monitor to assure that the same problem does not reoccur, and/or develop processes to prevent similar problems from occurring
- Deal with immediate problems that would interrupt patient care services
- Record and report problems, potential problems and/or problem solving activities to SFHA
- Assist in the development and implementation of standardized procedures for the orientation of Temporary Nursing Personnel
- Assume the responsibility for sending/recruiting and evaluating agency RFP's

TIME ALLOTMENT: Commit to being in the Palm Beach area 4 days per week, and accessible by phone 6 days per week

When not accessible by phone will be accessible by beeper until 9 pm, 6 days per week

QUALIFICATIONS: Education –

- Florida Registered Nurse Licensure, minimum of baccalaureate degree preferred.

Experience –

- A minimum of three years hospital experience.
- Staff and supervisory experience preferred.
- Familiarization with the activities of nursing agencies useful.

Skills –

- Excellent inter-personal relationships.
- Ability to deal with complex problems.
- Able to assimilate data and problem solve.
- High level of communication skills, both verbal and written.

PLAINTIFFS' TRIAL EXHIBIT 1741
(EXCERPTS)

INVOICE NO.
14788

INVOICE

A COMPLETE HEALTH SERVICE, INC.
1500 S.E. 3RD COURT – SUITE 105
DEERFIELD BEACH, FL. 33441

SOLD TO

FLORIDA MEDICAL CENTER
5000 West Oakland Park Blvd.
Ft. Lauderdale, Fl. 33313

SHIP TO

PAGE 1 of 2

CUSTOMER'S	ORDER	SALESMAN	DATE SHIPPED	TERMS	SHIPPED VIA	F.O.B.	DATE 5/16/88
		FOR THE WEEK ENDING 5/15/88					
5/9	UNIT	HUNG VAN NGUYEN, R.N.			12 hrs.		317.00
5/9	TEL.	VICKI HUNTER, R.N.			8½ hrs.		238.00
5/9	TEL.	MARY JOHNSON, R.N.			8 hrs.		216.00
5/9	TEL.	PAT HARRIS, R.N.			8 hrs.		216.00
5/9	TEL.	PAULA FRIEND, R.N.			7½ hrs.		202.50
5/9	UNIT	PHYLLIS THOMPSON, R.N.			8¼ hrs.		231.00
5/9	UNIT	CLYDE SCOTT, LPN			12 hrs.		281.00
5/9	TEL.	HELEN STEPP, R.N.			8 hrs.		216.00
5/9	TEL.	SUE JOHNSON, R.N.			8 hrs.		216.00
5/10	UNIT	BEVERLY KLEINKNECHT, R.N.			8 hrs.		208.00
5/10	UNIT	HUNG VAN NGUYEN, R.N.			12 hrs.		317.00

CUSTOMER'S	ORDER	SALESMAN	DATE SHIPPED	TERMS	SHIPPED VIA	F.O.B.	DATE 5/16/88
5/10	M/S	MARIA PAUL, LPN			8 hrs.		116.00
5/10	UNIT	PAULA FRIEND, R.N.			8¼ hrs.		236.25
5/10	TEL.	SUE JOHNSON, R.N.			8¼ hrs.		222.75
5/10	ER	DEBBIE MCCLAIN, R.N.			8 hrs.		216.00
5/10	UNIT	CLYDE SCOTT, LPN			12 hrs.		281.00
5/10	UNIT	PHYLLIS THOMPSON, R.N.			8½ hrs.		238.00
5/11	UNIT	BEVERLY KLEINKNECHT, R.N.			8 hrs.		208.00
5/11	UNIT	HUNG VAN NGUYEN, R.N.			12 hrs.		317.00
5/11	UNIT	PHYLLIS THOMPSON, R.N.			8½ hrs.		238.00
5/11	TEL.	ROXANNE MATTHEWS, R.N.			7 hrs.		182.00
5/11	UNIT	PAULA FRIEND, R.N.			8½ hrs.		229.50
5/11	M/S	JOANN WOODALL, R.N.			9 hrs.		208.00
5/11	UNIT	DEBBIE OHRT, R.N.			8 hrs.		208.00
5/11	UNIT	CLYDE SCOTT, LPN			13¼ hrs.		327.25
5/12	TEL.	HELEN STEPP, R.N.			8¼ hrs. (CHRG.)		239.25
5/12	UNIT	BEVERLY KLEINKNECHT, R.N.			8 hrs.		208.00
5/12	UNIT	BUD LOSEE, R.N.			9 hrs.		243.00
5/12	UNIT	PAULA FRIEND, R.N.			8½ hrs.		229.50
5/12	UNIT	CLYDE SCOTT, LPN			12¼ hrs. (9½ OT)		420.38
5/12	UNIT	PHYLLIS THOMPSON, R.N.			8¼ hrs.		231.00
5/13	UNIT	PHYLLIS THOMPSON, R.N.			8 hrs.		248.00
5/13	TEL.	HELEN STEPP, R.N.			8¼ hrs.		222.75
5/13	TEL.	PATRICIA BROWN, LPN			8 hrs.		176.00
5/13	TEL.	PAT HARRIS, R.N.			8 hrs.		216.00

CUSTOMER'S	ORDER	SALESMAN	DATE SHIPPED	TERMS	SHIPPED VIA	F.O.B.	DATE 5/16/88
5/14	TEL.	HELEN STEPP, R.N.			8 hrs.		240.00
5/14	TEL.	PATRICIA BROWN, LPN			8 hrs.		200.00
5/14	M/S	JOANN WOODALL, R.N.			12 hrs.		244.00
5/14	TEL.	SUE JOHNSON, R.N.			8 1/4 hrs.		247.50
5/14	UNIT	KIM BRACKEN, R.N.			16 hrs.		472.00
5/14	TEL.	PAT HARRIS, R.N.			8 hrs.		240.00
5/14	UNIT	DEBRA VIOLET, R.N.			8 hrs.		248.00
5/14	TEL.	JEANNE ELLEN DONAGHY, R.N.			8 hrs.		248.00
5/14	UNIT	CLYDE SCOTT, LPN			8 1/2 hrs. O.T.		318.75
5/15	TEL.	HELEN STEPP, R.N.			8 hrs. (1/2 hr. OT)		247.50
5/15	TEL.	PATRICIA BROWN, LPN			12 hrs.		296.00
5/15	TEL.	ROSE MURPHY, LPN			12 hrs.		296.00
5/15	M/S	JOANN WOODALL, R.N.			12 hrs.		244.00
5/15	TEL.	SUE JOHNSON, R.N.			8 1/4 hrs.		247.50
5/15	UNIT	DEBRA VIOLET, R.N.			12 hrs.		368.00
5/15	TEL.	JEANNE ELLEN DONAGHY, R.N.			12 hrs.		368.00
5/15	M/S	DEBBIE MCCLAIN, R.N.			8 hrs.		168.00
5/15	UNIT	CLYDE SCOTT, LPN			8 1/2 hrs. O.T.		344.25

TOTAL: $13,357.63

PLAINTIFFS' TRIAL EXHIBIT 1813

[LOGO]

South Florida Hospital Association, Inc.

REQUEST FOR PROPOSAL

The enclosed Request for Proposal is sent to you by The South Florida Hospital Association (hereinafter referred to as "Association"). The Association, in soliciting proposals is relying on; membership expression of the intent to purchase on the contract that results from this Request for Proposal, and the increasing awareness of the membership that maximum contract participation is essential to the success of the program.

Those individuals ultimately responsible for making pricing decisions are encouraged to call the Association offices (at 305-591-8020) with any questions pertaining to this request, membership commitment, etc.

Sincerely,

/s/ Chandler Bailey
Chandler Bailey
Vice President,
Planning & Development

FOR PALM BEACH COUNTY

Agencies are provided with a special envelope for submitting their original proposals and six (6) copies. Proposals should be delivered in person or by registered mail to the Association at the address above.

DATE: September 1, 1988 PROPOSAL NUMBER: #8802

DUE DATE: September 16, 1988 TIME DUE: 5 PM

PROPOSALS RECEIVED AFTER DUE DATE AND TIME WILL NOT BE ACCEPTED.

SERVICE BEING REQUESTED: HEALTHCARE PERSONNEL AGENCY SERVICES

CONTRACT PERIOD WILL BE FOR: 12 Months, Beginning October 17, 1988

8245 N.W. 53rd Street, Suite 200,
Miami, Florida 33166-4609
305/591-8020 (Dade), 305/522-3433
(Broward), FAX 305/591-8231

PROPOSAL DESCRIPTION AND CERTIFICATION

Proposal Specifications & Pricing Page:

See attached Pages for Complete Information

The Agency Must:

Invoice each hospital individually.

Look to each hospital for payment of their invoice and acknowledge in writing that the Agency understands that The South Florida Hospital Association is neither the guarantor nor the indemnitor nor makes any warranties, whatsoever, either as to any minimum aggregate volume of services utilized by the participating hospitals nor as to any other question involving the contractual relationship, which may arise between the agency and individual hospitals. Completion of the following Proposal Certification confirms the above acknowledgment.

Indemnify and hold harmless the Association and participating Hospitals against any and all suits, claims and expenses, including attorney's fees, damages and injuries or any claims by third parties relating to its services.

CERTIFICATION: It is hereby affirmed that this proposal has been completed in accordance with the terms and conditions set forth in this Request for Proposal and that the Agency will accept any awards made to it as a result of his response to this Request for Proposal.

Firm Name: _____

Address: _____ City _____ State _____ Zip _____

Authorized Signature: _____ Title: _____

Print Name: _____ Telephone (___) _____

(Signatures are also required on page 12)

PROPOSAL CONDITIONS AND INFORMATION

1) NUMBERED PARAGRAPHS: For the convenience of the vendors, each written paragraph in this Request for Proposal document has a specific number. If a Agency wishes to comment about any particular paragraph it should do so on a separate sheet of paper making sure to quote the specific paragraph number its comments refer to. The South Florida Hospital Association believes that the requirements of this Request for Proposal document are fair and equitable to the Agencies. However, agencies may comment on any paragraph so long as they do so IN WRITING AS PART OF THEIR RESPONSE TO THIS REQUEST FOR PROPOSAL.

2) COMPLETE ALL INFORMATION REQUESTED: Agencies must supply ALL information requested in this Request for Proposal.

3) THE ASSOCIATION RESERVES THE RIGHT to reject any or all proposals, any part of any proposal, or to request new proposals for all or any parts of the proposal as it deems necessary for the benefit of the Association and its membership.

4) EVALUATION FACTORS: The Association will evaluate proposals based on factors including, but not necessarily limited to, price. Considered factors are: strength of internal quality assurance program, acceptance of Agency of terms and conditions contained herein, cash terms, financial strength, service reputation, contents of written policy and procedure manual, etc.

5) CASH DISCOUNTS: Liberal cash discounts for members wishing to remit invoices in a more timely manner are ENCOURAGED, i.e. ____% 10, Net 30 days. (See page 11).

6) FUTURE ASSOCIATION MEMBERS: When new hospitals join the Association they will be eligible to immediately participate in the contract that results from this Request for Proposal.

7) ALL SERVICES RENDERED AS A result of this Request for Proposal will be subject to all conditions that are part of this Request for Proposal. It is further agreed that the proposals themselves and any resulting agreements to service shall comply with all Federal, State and Local laws relative thereto. It is further understood and agreed that the service for which quotes are requested and the Agency shall conform with any regulations of governmental agencies having jurisdiction at the time of delivery of such service. Without limiting the generality of the

foregoing, the Agency acknowledges and agrees that it is an independent contractor of each hospital that engages the Agency pursuant to this Request for Proposal and the Agency's response hereto, and nursing and other personnel who perform services at a hospital pursuant hereto are and for all purposes shall be deemed employees of the Agency. Such personnel in no event shall be employees of any hospital while performing services for which such hospital pays the Agency. The Agency shall withhold from compensation payable to such personnel, federal income tax, FICA and any other amounts required by law to be withheld by employers from compensation of employees, and remit all withheld amounts to the appropriate governmental agencies within the times provided by law. In addition, the Agency shall pay all employment and other taxes, fees or charges respecting such personnel payable by employers within the times provided by law. The Agency agrees to indemnify, defend and hold each hospital harmless from and against any and all claims, suits, liabilities, losses, damages and costs arising out of any breach by the Agency of the foregoing (including without limitation costs of settlement and appeal and attorneys' fees).

8) ACCESS OF THE GOVERNMENT TO BOOKS AND RECORDS: The final regulations regarding the government access to books and records provisions of the Medicare law were published in the December 30, 1982 of the Federal Register. Section 952 of the Omnibus Budget Reconciliation Act of 1980 (P.L. 96-499) contains certain language which legal counsel has advised providers to include in all contracts. Since Association request for proposals result in contracts between suppliers and Association members (providers), that language is included herein

and will be a part of any contract that results from this Request for Proposal:

> "I. Until the expiration of four years after the furnishing of SERVICES pursuant to this contract, the subcontractor shall make available upon written request to the Secretary, or upon request to the Comptroller General, or any of their duly authorized representatives, the contract, and books, documents and records of such subcontractor that are necessary to certify the nature and extent of such costs; and
>
> II. If the subcontractor carries out any of the duties of the contract through a subcontract, with a value or cost of $10,000 or more over a 12 month period, with a related organization, such subcontract shall contain a clause to the effect that until the expiration of four years after the furnishing of such SERVICES pursuant to such subcontract, the related organization shall make available, upon written request to the Secretary, or upon request to the Comptroller General, or any of their duly authorized representatives, the subcontract, all books, documents and records of such organization that are necessary to verify the nature and extent of such costs."

9) MEMBERS WILL CONTRACT DIRECTLY with the awarded Agency(ies). Members will remit payments directly to Agency(ies) after receipt of correct invoices. Members are encouraged to give priority

to the payment of invoices that are the result of participation on Association contracts.

10) EXISTING CONTRACTS WITH WINNING VENDOR: Any member with a preexisting contract with the winning Agency(ies) may switch immediately to the Association contract, without penalty, if in the best interests of that particular member.

11) THIRTY DAY CANCELLATION CLAUSE: In the event that the terms of the contract that results from this Request for Proposal are not being met by the awarded Agency(ies) and/or poor performance, the Association may give 30 days notice of the INTENT to terminate the contract. If, after 30 days notice is given, the unfulfilled terms of the contract are not met, termination of the contract WILL take place.

12) CORRESPONDENCE: The winning Agency(ies) is requested to "copy" the Association offices when any general correspondence pertaining to the contract that results from this Request is mailed to the membership.

PARAGRAPHS SPECIFIC TO THIS REQUEST FOR PROPOSAL

13) POSSIBLE MULTIPLE CONTRACTS: The Association reserves the right to award contracts to multiple Agencies as a result of this Request for Proposal. Every effort will be made to consolidate the number of awards made as a result of this RFP, based on all criteria requested and supplied by the respondents.

14) AGREEMENT PERIOD: Any contracts that result from this Request for Proposal will be in force for a period of one year, beginning *October 3, 1988.*

15) PRICE PROTECTION: All contract(s) resulting from this Request for Proposal will provide 12 months

pricing, beginning with the effective date of the contract(s).

16) MEMBER COMMITMENT TO CONTRACT(s): Page 21 contains a listing of member hospitals who have signed a commitment letter to utilize the awarded Agency(ies) on a preferred basis, as a result of this Request for Proposal. Commitment letters are signed by the Nursing Administrator and the Hospital Administrator. Agencies should see this as an indication of the level of support at each participating hospital. Commitment is defined as the priority use of the awarded agency(ies). In the event the awarded agency(ies) cannot fulfill a member request for services in a timely manner, the participating member may seek and retain the services of a non-contracted agency(ies). Each member hospital has the right to refuse the placement of particular individuals by the awarded agencies for any reason or no reason.

If an awarded Agency(ies) fails to perform as outlined in the Request's terms and conditions, the involved Hospital may, at its option, declare its commitment null and void for that particular agency(ies).

17) ESTIMATED VOLUMES: The volumes indicated on page 20 is an estimate only AND should not be construed as a volume guarantee, either expressed or implied. Usage information was obtained from surveys of participating hospitals and are submitted for informational purposes only.

18) HISTORY OF AGENCY: Each Agency will provide a detailed history of Agency, addressing year started, corporate structure, delineation of principals, staffing, corporate financial statements for the last two fiscal years (which shall be audited, if available), location of corporate and branch offices, affiliates,

pending or prior bankruptcy, insolvency or similar proceedings to which the Agency, or any principal or affiliate thereof is or was a party, and any pending or prior criminal proceedings against the Agency or any principal or affiliate thereof.

19) HIRING AND RECRUITMENT OF HOSPITAL/AGENCY PERSONNEL: Because of the relationship between each Association member (referred to below as a "Hospital") and its nursing personnel, and the time, effort and cost involved in recruiting and training nursing personnel, the following paragraph is set forth herein and must be part of any contract that results from this Request for Proposal:

Recognizing (i) the special nature of the relationship existing, or which will exist, between the Hospital and the nursing personnel which it employs, and (ii) that the recruiting and training of personnel by the Hospital is a costly and time consuming endeavor, the Agency agrees that it will not, during the term or any renewals hereof, or for a period of six (6) months following termination of this Agreement, directly or indirectly, through any manner or means, impair or initiate any attempt to impair the relationship that exists between the Hospital and nursing personnel employed by the Hospital through offers of employment, offers of contracts for services to be rendered by such personnel, offers to arrange permanent or temporary, full or part time placement of such personnel at hospitals or other health care providers, or otherwise; provided that the Agency shall not be prohibited from employing nursing personnel who solicit such employment otherwise than as a result of Agency actions described in the preceding clause. Without limiting other possible remedies that may be available for a breach of this covenant, the Agency agrees that in the event of a breach or

threatened breach of this covenant, the involved hospital may immediately terminate its contract with the Agency and that injunctive or other equitable relief shall be available to enforce this covenant, such relief to be without the necessity of posting a bond, cash or otherwise. The Agency further agrees that if any restriction in this paragraph is held by any court to be unenforceable or unreasonable, such lesser restriction as shall give maximum effect to the intentions of the parties shall be enforced in its place and remaining restrictions shall be enforced independently of each other.

20) USAGE REPORTS: Awarded vendor(s) will submit to the Association offices a usage report for each participating hospital on a form provided by the Association. It will include the following data elements:

Monthly (due on the 25th of the following month) a. total nursing hours supplied by classification, b. total hours requested by hospital, c. total hours unable to fill, d. hospital cancellations of assigned shifts, e. agency cancellations of assigned shifts, f. gross dollar volume billed, g. weekend shifts requested and weekend shifts filled, h. holiday shifts requested and holiday shifts filled. i. total hours requested by shift and total hours filled by shift.

Quarterly – (due on the 25th of the month following the quarter) a. Quality Assurance report which will include disciplinary proceedings, medication errors, etc. b. Continuing Education reports – compilation of all continuing education classes attended

21) DISCIPLINARY PROCEEDINGS: Awarded Agency (ies) will investigate any offense/complaint immediately. A written report, stating the investigative findings and Agency action, will be filed with the

hospital, within 10 working days following the completion of the investigation. For offenses/complaints which, in the hospitals opinion, creates ill-will towards that institution, the affected hospital will *not* be billed for the agency employee and the shift(s) involved. For offenses resulting in a State Board of Nursing hearing, all investigative and hearing expenses will be borne by the awarded Agency(ies). Hospitals will cooperate and provide the Agency with written documentation of verifiable offenses and other information as required to conduct the disciplinary hearing.

22) BUSINESS LICENSE: Each Agency must submit, with this proposal, a copy of their most current business license.

23) POLICY AND PROCEDURE MANUAL: Each Agency must submit, with this proposal, a copy of their most recent and reviewed policy and procedure manual. This manual will be reviewed by a screening committee and will play an integral part in the selection and award of resulting contracts. Each manual should include policies relating to disciplinary procedure, licensure, screening tests, references, quality assurance, infection control, and penalties imposed on nurses for terminating employment at the Agency and commencing employment with a hospital (into which the nurse was placed or otherwise).

24) CANCELLATION POLICY: A two (2) hour notice is required for cancellation, either by a participating Hospital OR Agency. Failure to provide such notice, by either party, WILL result in a cancellation penalty charge of two (2) times the affected hourly rate. Agency penalty charges will be reflected as a "credit" in the invoice immediately following the cancellation. Hospital charges will be invoiced as usual.

25) THE FOLLOWING DOCUMENTATION MUST BE SUBMITTED to each participating Hospital by the awarded Agency(ies) for all healthcare personnel:

- Proof of current licensure in State of Florida

  Minimum of two professional references (on file at the agency and available for member review on request)

  Proof of minimum one (1) years experience in an acute care setting within the most current three year period.

- Proof of current/valid CPR certification with annual review and annual inservice education in fire, safety and infection control (including universal precautions).

  Proof of compliance with immigration laws, if applicable (provided upon request).

- Current health history, including record of immunizations, current PPD (within 1 year) and physical limitations

- Additional documentation is required to show proof of special skills. Copies of *each exam and the acceptable passing scores* must be submitted to the hospital.

  NOTE: Copies of the asterisked criteria or other requirements of individual hospitals must be provided to each participating hospital, *prior* to the personnel being assigned.

26) IN-HOUSE ORIENTATION OF ALL AGENCY PERSONNEL is required by all participating hospitals and will entail review of individual hospital policy and procedures. All orientation expenses (to a minimum of 16 hours) *will* be borne by the Agency(ies).

27) DRESS CODE: Awarded Agency(ies) will communicate to and ensure all personnel meet the dress code requirements of each participating hospital.

28) AGENCY INVOICING: All invoices shall contain the following information by specific hospital unit: a. Nurses name b. Shift c. hourly rate and differential, if any d. overtime, if any e. additional charges itemized, if any. Invoices will be numbered. Participating Hospitals will have 14 calendar days from the receipt of the invoice for verification of said invoice.

29) THE ASSOCIATION RESERVES THE RIGHT to audit the awarded Agency(ies) for verification of the required documentation. Audits can be conducted at any time and without prior notification.

30) INSURANCE: Vendor(s) are required to purchase and maintain the following types of coverages:

a) Workers compensation and Employers Liability – covering the Agency's legal and statutory obligations for damages due to bodily injuries, either by accident or disease, occurring to Agency's employees, agents or servants as result of employment.

b) General liability – covering the Agency, its agents, employees, and servants for bodily injury, personal injury, or property damage claims of the public arising out of the premises, products, activities of the Agency. Minimum limits of liability for the above coverage shall be $1,000,000 combined single limit for bodily injury and property damage.

c) Professional liability – covering the Agency, its agents, employees, and servants for bodily injury and personal injury claims of

patients arising out of medical care rendered by the Agency. In the event the aforementioned coverage is through a "claims made" policy of insurance, the Agency hereby warrants that in the event the policy is either cancelled, replaced or non-renewed, the Agency will exercise the extended reporting option, commonly known as "tail coverage". Minimum limits of liability for the above coverage shall be $1,000,000 each incident/policy aggregate.

d) Automobile Liability (for those Agencies who will provide personnel for home care) – covering the Agency, its agents, employees, or servants for property damage and bodily injury claims of the public arising out of the ownership, maintenance, or use of vehicles, either owned, non-owned, or hired. Minimum limits of liability for the above coverage shall be $1,000,000 each accident.

Certificates of insurance for all above policies, listing the Association as Certificate Holder, must be supplied prior to contract initiation.

31) REPRESENTATION: The awarded Agency(ies) *agreed* not to use, either implied or expressed, the name of the South Florida Hospital Association, or any member institution, in connection with any advertising (whether print or electronic), public relations or recruitment efforts.

32) ASSOCIATION INVOLVEMENT: The Association is prepared to work closely with the awarded vendor(s), providing marketing and communications support, on a regular basis. Vendor(s) may contact the Association offices for assistance in resolving problems, member communications, etc.

VENDORS ARE REQUIRED TO ANSWER THE FOLLOWING QUESTIONS:

1) For the first quarter of 1988, list below the total number of hours assigned & worked at acute care facilities for each classification (list each hour only once):

	7-3	7-7	3-11	7-7	11-7
R.N. Med-Surg	___	___	___	___	___
R.N. Critical Care (adult)	___	___	___	___	___
R.N. Dialysis	___	___	___	___	___
R.N. ER	___	___	___	___	___
R.N. Orthopedics	___	___	___	___	___
R.N. Surgery	___	___	___	___	___
R.N. Recovery	___	___	___	___	___
R.N. Oncology	___	___	___	___	___
R.N. Psychiatric	___	___	___	___	___
R.N. Pediatric ICU	___	___	___	___	___
R.N. Neonatal ICU	___	___	___	___	___
R.N. CVICU	___	___	___	___	___
R.N. Nursery	___	___	___	___	___
R.N. Pediatrics	___	___	___	___	___
R.N. Labor/Delivery	___	___	___	___	___
R.N. Postpartum	___	___	___	___	___
R.N. Telemetry	___	___	___	___	___
R.N. Medical Rehab.	___	___	___	___	___
R.N. Home Health	___	___	___	___	___

R.N. Nursing Home	___	___	___	___	___
L.P.N. Med-Surg	___	___	___	___	___
L.P.N. Critical Care	___	___	___	___	___
L.P.N. Psychiatric	___	___	___	___	___
L.P.N. Medical Rehab.	___	___	___	___	___
L.P.N. Home Health	___	___	___	___	___
L.P.N. Nursing Home	___	___	___	___	___
Nursing Assistants	___	___	___	___	___
C.O.R.T. (OR Tech.)	___	___	___	___	___
Unit Secretaries	___	___	___	___	___

VENDOR QUESTIONS CONT'D

2) Describe in detail the Agency's skills verification process for its staff:

_____

_____

_____

_____

3) Enter minimum shift requirements (if any): _____

4) **CREDIT TERMS**: _____% 10 Days Net 30

5) List by percentage (%) the Agencies geographic coverage:

North Palm Beach County	_____%
South Palm Beach County	_____%
Central Palm Beach County	_____%
West Palm Beach County	_____%
Outside of Palm Beach County	_____%
	100%

6) State office coverage and staffing provided (i.e., 7 day/24 hour "live" operators, level of supervisory personnel___):

_____

_____

_____

_____

Use additional pages, if necessary.

ADMINISTRATIVE FEE

The awarded vendor agrees to remit to The South Florida Hospital Association an Administrative Fee in the amount of two percent (.02) of the gross dollar volume of all participating hospitals, under the agreement/contract that results from this Request for Proposal. Such remittance is to be paid monthly and submitted with usage reports identifying total volume b, hospital, by month. The Association's policies and procedures with regard to Administrative Fees are in strict accordance with Subsection 1877(b)(3)(A). Public Law 195-142, Medicare/Medicaid Anti-Fraud and Abuse Amendment.

AGENCY:_____

AUTHORIZED
SIGNATURE:_____

PRINT NAME:_____

TITLE:_____

PHONE NUMBER:( )_____

DATE:_____

THE SOUTH FLORIDA
HOSPITAL ASSOC.
8245 N.W. 53rd STREET – SUITE 200
MIAMI, FLORIDA 33166-4609

RFP# : 8802
DESC : HPAS
DUE : 9/16/88
PAGE # 13

		NURSING RATES – PER HOUR		
CLASSIFICATION	SHIFT	M-F	SAT/SUN	HOLIDAYS
R.N. MED/SURG	7-3			
	7-7			
	3-11			
	7-7			
	11-7			
R.N. CRITICAL CARE	7-3			
	7-7			
	3-11			
	7-7			
	11-7			
R.N. TELEMETRY	7-3			
	7-7			
	3-11			
	7-7			
	11-7			
R.N. OPERATING ROOM/R.R.	7-3			
	7-7			
	3-11			
	7-7			
	11-7			

R.N. DIALYSIS	7-3	_____	_____	_____
	7-7	_____	_____	_____
	3-11	_____	_____	_____
	7-7	_____	_____	_____
	11-7	_____	_____	_____

[Similiar Pages 14 Through 19 Omitted]

THE SOUTH FLORIDA
HOSPITAL ASSOCIATION
8245 N.W. 53 STREET, SUITE 200
MIAMI, FLORIDA 33166-4609

RFP#: 8802
DESC: HPAS
DUE: 9/16/88
PAGE: 20

MEMBER HOSPITALS PARTICIPATING IN PROGRAM

Page 21 contains a listing which represents those member hospitals which have committed to participate in the Association's preferred nursing agency contract. Other member hospitals have indicated an interest to consider the selected agencies and participate at a later date. The hospitals listed used approximately 275,000 hours of temporary nurse staffing in calendar year 1987. The Association expects that figure to be greater during the contract period, because of the overall nursing supply problem in South Florida.

SOUTH FLORIDA HOSPITAL ASSOCIATION – 591-8020

ROSTER OF HOSPITALS PARTICIPATING IN HEALTHCARE PERSONNEL AGENCY SERVICES

PALM BEACH COUNTY

NAME OF INSTITUTION	ADDRESS	CITY, ZIP	TELEPHONE	BEDS
Bethesda Memorial Hospital	2815 S. Seacrest Blvd.	Boynton Beach, 33435	(407) 737-7733	330
Delray Community Hospital	3332 Linton Blvd.	Delray Beach, 33443	(407) 498-4440	211
Doctors Hospital/Lake Worth	2829 Tenth Avenue, N.	Lake Worth, 33460	(407) 967-7800	200
Good Samaritan Hospital	Flagler Drive at Palm Beach Lake Blvd.	West Palm Beach, 53402	(407) 655-3311	285
John F. Kennedy Mem. Hosp.	South Congress Avenue	Lake Worth, 33460	(407) 965-7300	369
AMI Palm Beach Garden	3360 Butte Road	Palms Beach Gardens, 33410	(407) 622-1411	204
Palms West Hospital	13001 State Road 80	Loxahatchee, 33470	(407) 798-3300	117
Wellington Reg. Med. Ctr.	10010 Forest Hill Blvd.	West Palm Beach, 33414	(407) 798-8501	120
West Boca Medical Center	21644 State Road F	Boca Raton, 33428	(407) 488-8000	170

Other hospitals in Palm Beach may elect to participate at a later date.

PLAINTIFFS' TRIAL EXHIBIT 1820

"CREATING A PREFERRED NURSING AGENCY"
BY CHANDLER BAILEY

Creating a Preferred Nursing Agency

by

Chandler Bailey

Vice President
South Florida Hospital Association

There's no need to rehash the data; there *is* a shortage of nurses. It's acutely felt by the hospitals in South Florida, and so it logically becomes an issue for the South Florida Hospital Association to address.

The Association is a nonprofit organization that represents approximately 50 member hospitals in Broward, Dade and Monroe counties. Among its major purposes are education, representation and advocacy.

An Association Nursing Task Force made up of hospital administrators, directors of nursing, directors of human resources, and nursing educators took on the nurse shortage issue in the spring of 1988. Among the other things they found was this telling statistic: Hospitals in Dade and Broward counties spend about $35 million annually on temporary nursing services.

That figure was increasing each year as was the average cost paid for each nurse. In addition, many hospital nursing administrators expressed concern over the coordination and quality of these temporary nursing services.

While looking at long-term solutions for the nurse shortage problem, the Task Force decided it must look at

this short-term solution that most hospitals were using. In order to address the cost and quality issues, the Task Force considered two distinct possibilities.

1. Reactivating the SFHA-owned and operated nursing agency that was created in the late 70s.

2. Establishing a preferred agency network with existing independent nursing agencies.

The SFHA Board of Directors chose the latter path, and so staff began the work required to establish such a network.

From the hospital's perspective

A committee made up of hospital nursing directors worked with staff to develop the first major step for the program – a request for proposal to be completed by interested agencies. Looking at the process from the hospital's perspective, the committee addressed the conditions and terms that hospitals would expect the agencies to meet.

Discussions and concerns centered around:

1. Quality

2. Continuity of nursing care

3. Pricing

4. Independent contractor vs. employee relationship

Because of recent federal regulations, the committee insisted that nurses should have an employer/employee relationship with the independent agency. This would preclude any interpretation that a nurse had become an

employee of the hospital for which he or she was working.

The quality and continuity of care issues were addressed in specific sections of the request for proposal. Those sections called for clear policies and procedures that addressed:

- documentation of nurses' experience
- copies of tests given to nurses
- passing scores
- periodic evaluation of nurses
- procedures to determine licensing status, such as probation
- CPR certification
- reports on CEU credits.

And because of the volume of business the members of the preferred network were likely to get, the RFP process itself which included bids, was expected to bring in extremely competitive prices.

Thorough review of the proposed request for proposal by the Association's attorneys also became part of the development process. Before completing the RFP, the Association requested legal counsel's opinion on a number of issues, including any possible antitrust implications of the program. On receiving counsel's favorable opinion, work proceeded.

Hospitals express interest

At the same time, the Association sought to determine its members' interest in participating in a preferred

nursing agency network. At least 20 hospitals initially made a commitment to work with the new network. To date, 24 hospitals in Dade and Broward counties have signed up.

Once the RFP was approved and a substantial number of hospitals had made a commitment of interest in the network, it was time to begin seeking the agencies to participate.

The mailing list for agencies to receive the RFP was recommended by member hospitals. These were the agencies they knew about or worked with or agencies that they knew had experience working with hospitals. In addition, "invitation to bid" notices were placed in the major Dade and Broward newspapers. About 40 agencies serving the two counties were mailed the RFP; about 15 responded.

Selection process thorough

An association committee of nursing service directors and human resources directors reviewed those responses and suggested that proposals be returned to selected vendors. Those vendors were requested to review their prices.

After completion of this step, selected agencies were invited to send representatives in for interviews with the committee. The purpose of these interviews was to examine more closely the quality of care issue and the agencies' routine methods of addressing it. They were questioned regarding methods of staff selection, the types

of nurse specialities, and frequency of staff evaluations as well.

Seven agencies in Dade and Broward counties became the first members of the SFHA preferred agency network.

Program expands

In Palm Beach County, a similar process was taking place. Hospital directors of nursing concerned about the $8 1/4 million spent on temporary nursing services were joining together to create a program. Learning of the SFHA activity in Broward and Dade, they contacted the Association.

The Association staff worked with them, adapting the process and the request for proposal to suit their needs. About 35 agencies received the RFP, and eight were selected to be part of the Palm Beach program. At the same time, 12 hospitals signed up to participate, each becoming an Associate Member of the SFHA in order to receive this service.

So today the South Florida Hospital Association is administering two preferred nursing agency programs; one in Palm Beach county and one for Broward and Dade county hospitals. What are our major concerns and our plans for the future?

Agencies made commitment

Our first concern is that both of these networks become strong, viable entitles, receiving the full support and commitment of the hospitals in the Association.

There are long-term alliances between hospital staffing offices and agencies with which they have worked. If those agencies chose not to participate or were not chosen, the change to the new, preferred agencies may not be easy.

At the same time, agencies not a part of the program may slash their prices in order to underbid those in the preferred program. This "Cherry picking" is easy to do after the fact.

We intend to emphasize to our hospitals that the agencies that chose to participate in our RFP process and were chosen to become part of our program have made a serious and substantial commitment to our hospitals.

1. They have agreed to hold prices for one year.

2. They have fulfilled our requirements for quality assurance, staff selection and training, and evaluations.

3. They have agreed to an employer/employee relationship with their nurses working in our hospitals.

The importance of this last commitment (although beyond the purview of this article) cannot be overemphasized. Suffice it to say, that new federal regulations put hospitals at risk of becoming liable for benefits and other obligations for independent contractors who begin to "look" like regular employees. The agencies in the SFHA preferred program have accepted an employer relationship and free hospitals of that risk.

In future years, we hope the program will help reduce prices paid for temporary nursing services. At this

point, after numerous price increases as the nursing shortage increased, the program stabilizes prices. However, that in itself is an accomplishment.

To support Center for Health Careers

One of our major hopes for the program is that it will assist us in seeking out long-term solutions to the nurse shortage. It will do that through the 2 percent administrative fee that is part of the program. The 2 percent fee is paid to the Association by each participating agency. The money collected will be used to support our Center for Health Careers, which is seeking new, innovative ways to increase the supply of nurses in South Florida.

In its first project, a media advertising campaign, the Center directly reached more than 1,100 young persons interested in nursing. Targeted to young adults, the $50,000 advertising campaign asked them to call for more information about nursing. In about six weeks, more than 1,100 had inquired and had received pertinent information, including the information needed to contact local colleges of nursing regarding admission. Some exceptional students were also put in contact with hospitals that provide scholarships.

With the 2 percent administrative fee from the preferred agency program, the SFHA plans to continue to seek ways to work with colleges and the local community to increase our long-term supply of nurses.

Reviewing the process

The SFHA has just completed the first request for proposal/bidding process and selection of agencies, so it's premature to thoroughly evaluate the program. When we do we will have two distinct processes to evaluate – the Dade/Broward model and the Palm Beach model. We may find that one or the other works better or brings about stronger commitment to the program.

One recommendation for change that we can make at this point, however, is that the selection process begin earlier in the year. South Florida's seasonal fluctuation in the need for nurses was moving towards its peak at the time the bidding took place. If it were moving towards its ebb, then pricing might have been more favorable for the hospitals.

The developmental work has been extremely time consuming. The request for proposal alone was a 19-page document, taking months to develop. In addition, there was confusion and some consternation among agencies who were not on the original list to receive the RFP. All agencies that requested it in time, however, were mailed a copy and eligible to participate.

Although the initial price savings for hospitals has not been as great as hoped, we are confident that we have achieved price stabilization through a fair, open process. With continued promotion, agency participation, and hospital support, we believe the SFHA Preferred Nursing Agency Program will be a resounding success.

* * *

Plaintiffs' Trial Exhibit 1831

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

		PRN (OLD)		PRN (NEW)		Medex, Inc.	
CLASSIFICATION	SHIFT	M – F	SAT/SUN	M – F	SAT/SUN	M – F	SAT/SUN
– RNs –							
MED / SURG	7 - 3	$26.50	$28.95	$25.50	$27.50	$26.50	$29.95
	7 - 7	$27.50	$28.95	$25.50	$27.50	$27.32	$29.95
	3 - 11	$27.50	$28.95	$27.50	$28.50	$28.95	$29.95
	7 - 7	$28.95	$28.95	$28.95	$28.95	$28.95	$29.95
	11 - 7	$28.95	$28.95	$28.95	$28.95	$28.95	$29.95
CRITICAL CARE	7 - 3	$34.50	$36.95	$33.25	$35.50	$32.95	$35.95
	7 - 7	$34.50	$36.95	$33.25	$35.50	$33.50	$35.95
	3 - 11	$35.95	$36.95	$35.95	$36.95	$34.50	$35.95
	7 - 7	$36.95	$36.95	$36.95	$36.95	$34.50	$35.95
	11 - 7	$36.95	$36.95	$36.95	$36.95	$34.50	$35.95
TELEMETRY	7 - 3	$34.50	$36.95	$31.95	$33.95	$32.95	$35.95
	7 - 7	$34.50	$36.95	$31.95	$33.95	$33.50	$35.95
	3 - 11	$35.95	$36.95	$32.95	$34.50	$34.50	$35.95
	7 - 7	$36.95	$36.95	$32.95	$34.50	$34.50	$35.95
	11 - 7	$36.95	$36.95	$33.50	$35.50	$34.50	$35.95
O.R.	7 - 3	$34.50	$36.95	$33.25	$35.50		
	7 - 7	$34.50	$36.95	$33.25	$35.50		
	3 - 11	$35.95	$36.95	$35.95	$36.95		
	7 - 7	$36.95	$36.95	$36.95	$36.95		
	11 - 7	$36.95	$36.95	$36.95	$36.95		
PEDIATRIC	7 - 3	$26.50	$28.95	$33.25	$35.50		
	7 - 7	$27.50	$28.95	$33.25	$35.50		
	3 - 11	$27.50	$28.95	$35.95	$36.95		
	7 - 7	$28.95	$28.95	$36.95	$36.95		
	11 - 7	$28.95	$28.95	$36.95	$36.95		
PSYCHIATRIC	7 - 3	$26.50	$28.95	$25.50	$27.50	$32.95	$35.95
	7 - 7	$27.50	$28.95	$25.50	$27.50	$33.50	$35.95
	3 - 11	$27.50	$28.95	$27.50	$28.95	$34.50	$35.95
	7 - 7	$28.95	$28.95	$28.95	$28.95	$34.50	$35.95
	11 - 7	$28.95	$28.95	$28.95	$28.95	$34.50	$35.95
LABOR/DELIVERY	7 - 3	$26.50	$28.95	$25.50	$27.50		
	7 - 7	$27.50	$28.95	$25.50	$27.50		
	3 - 11	$27.50	$28.95	$27.50	$28.95		
	7 - 7	$28.95	$28.95	$28.95	$28.95		
	11 - 7	$28.95	$28.95	$28.95	$28.95		

		PRN (OLD)		PRN (NEW)		Medex, Inc.	
CLASSIFICATION	SHIFT	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN
NEO – ICU	7 - 3	$34.50	$36.95	$33.25	$35.50	$32.95	$35.95
	7 - 7	$34.50	$36.95	$33.25	$35.50	$33.50	$35.95
	3 - 11	$35.95	$36.95	$35.95	$36.95	$34.50	$35.95
	7 - 7	$36.95	$36.95	$36.95	$36.95	$34.50	$35.95
	11 - 7	$36.95	$36.95	$36.95	$36.95	$34.50	$35.95
		ALL HOLIDAYS ARE BILLED AT 1.33					
- LPNs -							
HOME HEALTH	7 - 3	$20.00	$21.75	$19.50	$20.95		
	7 - 7	$20.00	$21.75	$19.50	$20.95		
	3 - 11	$21.00	$21.75	$21.00	$21.75		
	7 - 7	$21.75	$21.75	$21.75	$21.75		
	11 - 7	$21.75	$21.75	$21.75	$21.75		
MED – SURG	7 - 3	$21.75	$22.50	$20.95	$21.95	$21.95	$25.95
	7 - 7	$21.75	$22.50	$20.95	$21.95	$22.65	$25.95
	3 - 11	$21.75	$22.50	$21.75	$22.50	$23.95	$25.95
	7 - 7	$22.50	$22.50	$22.50	$22.50	$23.95	$25.95
	11 - 7	$22.50	$22.50	$22.50	$22.50	$23.95	$25.95
NURSING HOME	7 - 3	$20.25	$21.00	$20.25	$20.95		
	7 - 7	$20.25	$21.00	$20.25	$20.95		
	3 - 11	$20.25	$21.00	$20.25	$21.00		
	7 - 7	$21.00	$21.00	$21.00	$21.00		
	11 - 7	$21.00	$21.00	$21.00	$21.00		

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

CLASSIFICATION	SHIFT	Atlantic (OLD) M – F	Atlantic (OLD) SAT/SUN	Atlantic (NEW) M – F	Atlantic (NEW) SAT/SUN	Florida Nurses Network M – F	Florida Nurses Network SAT/SUN	(OLD) Expicare Nursing M – F	(OLD) Expicare Nursing SAT/SUN
– RNs –									
NEO / SURG	7 - 3	$27.70	$30.80	$25.80	$28.80	$25.81	$28.81	$27.00	$30.00
	7 - 7	$28.25	$30.80	$26.30	$28.80	$25.81	$28.81	$27.00	$30.00
	3 - 11	$29.25	$30.80	$27.30	$28.80	$27.31	$28.81	$27.00	$30.00
	7 - 7	$29.25	$30.80	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
	11 - 7	$29.25	$30.80	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
CRITICAL CARE	7 3	$35.40	$38.50	$33.35	$36.40	$31.66	$35.48	$31.50	$34.50
	7 - 7	435.95	$38.50	$33.85	$36.40	$31.66	$35.48	$31.50	$34.50
	3 - 11	$36.95	$38.50	$34.85	$36.40	$32.47	$35.48	$31.50	$34.50
	7 - 7	$36.95	$38.50	$34.85	$36.40	$33.97	$35.48	$31..	$34.50
	11 - 7	$36.95	$38.50	$34.85	$36.40	$33.97	$35.48	$31.50	$34.50
TELEHEIRY	7 - 3	$35.40	$38.50	$33.35	$36.40	$31.66	$35.48	$31.50	$34.50
	7 - 7	$35.95	$38.50	$33.85	$36.40	$31.66	$35.48	$31.50	$34.50
	3 - 11	$36.95	$38.50	$34.85	$36.40	$32.47	$35.48	$31.50	$34.50
	7 - 7	$36.95	$38.50	$34.85	$36.40	$33.97	$35.48	$31.50	$34.50
	11 - 7	$36.95	$38.50	$34.85	$36.40	$33.97	$35.48	$31.50	$34.50
O.R.	7 - 3	$35.40	$38.50	$33.35	$36.40	$31.66	$35.48	$31.50	$34.50
	7 - 7	$35.95	$38.50	$33.85	$36.40	$31.66	$35.48	$31.50	$34.50
	3 - 11	$36.95	$38.50	$34.85	$36.40	$32.47	$35.48	$31.50	$34.50
	7 - 7	$36.95	$38.50	$34.85	$36.40	$33.97	$35.48	$31.50	$34.50
	11 - 7	$36.95	$38.50	$34.85	$35.40	$33.97	$35.48	$31.50	$34.50
PEDIATRIC	7 - 3	$35.40	$38.50	$25.80	$28.80	$25.81	$28.81	$27.00	$30.00
	7 - 7	$35.95	$38.50	$26.30	$28.80	$25.81	$28.81	$27.00	$30.00
	3 - 11	$36.95	$38.50	$27.30	$28.80	$27.31	$28.81	$27.00	$30.00
	7 - 7	$36.95	$38.50	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
	11 - 7	$36.95	$38.50	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
PSYCHIATRIC	7 - 3	$27.70	$30.80	$25.80	$28.80	$25.81	$28.81	$27.00	$30.00
	7 - 7	$28.25	$30.80	$26.30	$28.80	$25.81	$28.81	$27.00	$30.00
	3 - 11	$29.25	$30.80	$27.30	$28.80	$27.31	$28.81	$27.00	$30.00
	7 - 7	$29.95	$30.80	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
	11 - 7	$29.25	$30.80	$27.30	$28.80	$28.81	$28.81	$27.00	$30.00
LABOR/DELIVERY	7 - 3	$35.40	$38.50	$33.35	$36.40	$28.81	$33.12	$27.00	$30.00
	7 - 7	$35.95	$38.50	$33.85	$36.40	$28.81	$33.12	$27.00	$30.00
	3 - 11	$36.95	$38.50	$34.85	$36.40	$30.13	$33.12	$27.00	$30.00
	7 - 7	$36.95	$38.50	$34.85	$36.40	$31.61	$33.12	$27.00	$30.00
	11 - 7	$36.95	$38.50	$34.85	$36.40	$31.61	$33.12	$27.00	$30.00

		Atlantic (OLD)		Atlantic (NEW)		Florida Nurses Network		(OLD) Expicere Nursing	
CLASSIFICATION	SHIFT	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN
NEO – ICU	7 - 3	$36.95	$40.00	$36.95	$40.00	$31.66	$35.48	$31.50	$34.50
	7 - 7	$37.50	$40.00	$37.50	$40.00	$31.66	$35.48	$31.50	$34.50
	3 - 11	$38.50	$40.00	$38.50	$40.00	$32.47	$35.48	$31.50	$34.50
	7 - 7	$38.50	$40.00	$38.50	$40.00	$33.97	$35.48	$31.50	$34.50
	11 - 7	$38.50	$40.00	$38.50	$40.00	$33.97	$35.48	$31.50	$34.50
		ALL HOLIDAYS ARE BILLED AT 1.33							
– LPNs –									
HOME HEALTH	7 - 3					$19.95	$20.95	$18.00	$18.00
	7 - 7					$19.95	$20.95	$18.00	$18.00
	3 - 11					$19.95	$20.95	$18.00	$18.00
	7 - 7					$19.95	$20.95	$18.00	$18.00
	11 - 7					$19.95	$20.95	$18.00	$18.00
MED – SURG	7 - 3	$20.80	$23.50	$20.80	$23.50	$20.00	$22.81	$24.00	$27.00
	7 - 7	$21.35	$23.50	$21.35	$23.50	$20.00	$22.81	$24.00	$27.00
	3 - 11	$22.35	$23.50	$22.35	$23.50	$21.32	$22.81	$24.00	$27.00
	7 - 7	$22.35	$23.50	$22.35	$23.50	$22.81	$22.81	$24.00	$27.00
	11 - 7	$22.35	$23.50	$22.35	$23.50	$22.81	$22.81	$24.00	$27.00
NURSING HOME	7 - 3							$19.00	$21.00
	7 - 7							$19.00	$21.00
	3 - 11							$19.00	$21.00
	7 - 7							$19.00	$21.00
	11 - 7							$19.00	$21.00

Palm Beach County

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

CLASSIFICATION	SHIFT	(NEW) Expicare Nursing M – F	(NEW) Expicare Nursing SAT/SUN	(OLD) American Health Tech M – F	(OLD) American Health Tech SAT/SUN	(NEW) American Health Tech M – F	(NEW) American Health Tech SAT/SUN
– RNs –							
MED / SURG	7 - 3	$26.00	$29.00	$26.00	$29.00	$26.00	$29.00
	7 - 7	$26.50	$29.50	$26.25	$29.00	$26.25	$29.00
	3 - 11	$27.00	$30.00	$26.75	$29.00	$26.75	$29.00
	7 - 7	$28.00	$31.00	$27.25	$29.00	$27.60	$29.00
	11 - 7	$28.00	$31.00	$27.50	$29.00	$28.00	$29.00
CRITICAL CARE	7 - 3	$31.00	$34.00	$35.50	$37.00	$35.25	$36.75
	7 - 7	$31.50	$34.50	$35.70	$37.00	$35.45	$36.75
	3 - 11	$32.00	$35.00	$36.00	$37.00	$35.75	$36.75
	7 - 7	$33.00	$36.00	$36.70	$37.00	$36.45	$36.75
	11 - 7	$33.00	$36.00	$37.00	$37.00	$36.45	$36.75
TELEMETRY	7 - 3	$31.00	$34.00	$35.50	$37.00	$35.25	$36.75
	7 - 7	$31.50	$34.50	$35.70	$37.00	$35.45	$36.75
	3 - 11	$32.00	$35.00	$36.00	$37.00	$35.75	$36.75
	7 - 7	$33.00	$36.00	$36.70	$37.00	$36.45	$36.75
	11 - 7	$33.00	$36.00	$37.00	$37.00	$36.45	$36.75
O.R.	7 - 3	$31.00	$34.00	$35.50	$37.00	$35.50	$37.00
	7 - 7	$31.50	$34.50	$35.70	$37.00	$35.70	$37.00
	3 - 11	$32.00	$35.00	$36.00	$37.00	$36.00	$37.00
	7 - 7	$33.00	$36.00	$36.70	$37.00	$36.70	$37.00
	11 - 7	$33.00	$36.00	$37.00	$37.00	$37.00	$37.00
PEDIATRIC	7 - 3	$26.00	$29.00	$26.00	$29.00	$26.00	$29.00
	7 - 7	$26.50	$29.50	$26.25	$29.00	$26.25	$29.00
	3 - 11	$27.00	$30.00	$26.75	$29.00	$26.75	$29.00
	7 - 7	$28.00	$31.00	$27.25	$29.00	$27.25	$29.00
	11 - 7	$28.00	$31.00	$27.50	$29.00	$27.50	$29.00
PSYCHIATRIC	7 - 3	$26.00	$29.00	$35.50	$37.00	$35.50	$37.00
	7 - 7	$26.50	$29.50	$35.70	$37.00	$35.70	$37.00
	3 - 11	$27.00	$30.00	$36.00	$37.00	$36.00	$37.00
	7 - 7	$28.00	$31.00	$36.70	$37.00	$36.70	$37.00
	11 - 7	$28.00	$31.00	$37.00	$37.00	$37.00	$37.00
LABOR/DELIVERY	7 - 3	$26.00	$29.00	$35.50	$37.00	$35.50	$37.00
	7 - 7	$26.50	$29.50	$35.70	$37.00	$35.70	$37.00
	3 - 11	$27.00	$30.00	$36.00	$37.00	$36.00	$37.00
	7 - 7	$28.00	$31.00	$36.70	$37.00	$36.70	$37.00
	11 - 7	$28.00	$31.00	$37.00	$37.00	$37.00	$37.00

		(NEW) Expicare Nursing		(OLD) American Health Tech		(NEW) American Health Tech	
CLASSIFICATION	SHIFT	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN
NEO – ICU	7 - 3	$31.00	$34.00	$35.50	$37.00	$35.50	$37.00
	7 - 7	$31.50	$34.50	$35.70	$37.00	$35.70	$37.00
	3 - 11	$32.00	$35.00	$36.00	$37.00	$36.00	$37.00
	7 - 7	$33.00	$36.00	$36.70	$37.00	$36.70	$37.00
	11 - 7	$33.00	$36.00	$37.00	$37.00	$37.00	$37.00
– LPNs –							
HOME HEALTH	7 - 3	$22.00	$25.00				
	7 - 7	$22.50	$25.50				
	3 - 11	$23.00	$26.00				
	7 - 7	$24.00	$27.00				
	11 - 7	$24.00	$27.00				
MED – SURG	7 - 3	$22.00	$25.00	$21.00	$26.00	$21.00	$26.00
	7 - 7	$22.50	$25.50	$21.35	$26.00	$21.35	$26.00
	3 - 11	$23.00	$26.00	$22.00	$26.00	$22.00	$26.00
	7 - 7	$24.00	$27.00	$23.35	$26.00	$23.35	$26.00
	11 - 7	$24.00	$27.00	$24.00	$26.00	$24.00	$26.00
NURSING HOME	7 - 3						
	7 - 7						
	3 - 11						
	7 - 7						
	11 - 7						

Palm Beach County

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

CLASSIFICATION	SHIFT	Complete Health Svc M – F	Complete Health Svc SAT/SUN	Critical Health Care Inc. (OLD) M – F	Critical Health Care Inc. (OLD) SAT/SUN	Critical Health Care Inc. (NEW) M – F	Critical Health Care Inc. (NEW) SAT/SUN	(OLD) Quality Professional M – F	(OLD) Quality Professional SAT/SUN
– RNs –									
MED / SURG	7 - 3	$25.65	$27.50	$25.00	$28.00	$24.50	$28.00		
	7 - 7			$25.33	$28.33	$24.50	$28.00		
	3 - 11	$26.00	$28.00	$26.00	$29.00	$25.25	$28.00		
	7 - 7			$26.67	$29.67	$26.00	$28.00		
	11 - 7	$27.00	$28.50	$27.00	$30.00	$26.00	$28.00		
CRITICAL CARE	7 - 3	$32.40	$33.40					$33.00	$36.00
	7 - 7							$33.33	$36.33
	3 - 11	$33.00	$34.50					$34.00	$37.00
	7 - 7							$34.67	$37.67
	11 - 7	$33.50	$36.00					$35.00	$38.00
TELEMETRY	7 - 3	$32.40	$33.40			$30.00	$34.00	$33.00	$36.00
	7 - 7					$30.00	$34.00	$33.33	$36.33
	3 - 11	$33.00	$34.50			$31.00	$34.00	$34.00	$37.00
	7 - 7					$32.00	$34.00	$34.67	$37.67
	11 - 7	$33.50	$36.00			$32.00	$34.00	$35.00	$38.00
O.R.	7 - 3	$32.40	$33.40					$33.00	$36.00
	7 - 7							$33.33	$36.33
	3 - 11	$33.00	$34.50					$34.00	$37.00
	7 - 7							$34.67	$37.67
	11 - 7	$33.50	$36.00					$35.00	$38.00
PEDIATRIC	7 - 3	$32.40	$33.40	$33.00	$36.00	$30.00	$34.00	$33.00	$36.00
	7 - 7			$33.33	$36.33	$30.00	$34.00	$33.33	$36.33
	3 - 11	$33.00	$34.50	$34.00	$37.00	$31.00	$34.00	$34.00	$37.00
	7 - 7			$34.67	$37.67	$32.00	$34.00	$34.67	$37.67
	11 - 7	$33.50	$36.00	$35.00	$38.00	$32.00	$34.00	$35.00	$38.00
PSYCHIATRIC	7 - 3	$32.40	$33.40	$33.00	$36.00	$30.00	$34.00	$33.00	$36.00
	7 - 7			$33.33	$36.33	$30.00	$34.00	$33.33	$36.31
	3 - 11	$33.00	$34.50	$34.00	$37.00	$31.00	$34.00	$34.00	$37.00
	7 - 7			$34.67	$37.67	$32.00	$34.00	$34.67	$37.67
	11 - 7	$33.50	$36.00	$35.00	$38.00	$32.00	$34.00	$35.00	$38.00
LABOR/DELIVERY	7 - 3	$32.40	$33.40					$33.00	$36.00
	7 - 7							$33.33	$36.33
	3 - 11	$33.00	$34.50					$34.00	$37.00
	7 - 7							$34.67	$37.67
	11 - 7	$33.50	$36.00					$35.00	$38.00

		Complete Health Svc		Critical Health Care Inc. (OLD)		Critical Health Care Inc. (NEW)		(OLD) Quality Professional	
CLASSIFICATION	SHIFT	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN
NEO – ICU	7 - 3	$32.40	$33.40					$33.00	$36.00
	7 - 7							$33.33	$36.33
	3 - 11	$33.00	$34.50					$34.00	$37.00
	7 - 7							$34.67	$37.67
	11 - 7	$33.50	$36.00					$35.00	$38.00
– LPNs –									
HOME HEALTH	7 - 3	$23.00	$25.50						
	7 - 7								
	3 - 11	$24.00	$26.00						
	7 - 7								
	11 - 7	$25.00	$27.00						
MED – SURG	7 - 3	$21.00	$23.00	$22.00	$25.00	$20.00	$25.00		
	7 - 7			$22.33	$25.33	$20.00	$25.00		
	3 - 11	$22.50	$24.00	$23.00	$26.00	$21.50	$25.00		
	7 - 7			$23.67	$26.67	$22.00	$25.00		
	11 - 7	$23.00	$25.00	$24.00	$27.00	$22.00	$25.00		
NURSING HOME	7 - 3	$23.00	$25.50	$25.00	$28.00	$24.50	$28.00		
	7 - 7			$25.33	$28.33	$24.50	$28.00		
	3 - 11	$24.00	$26.00	$26.00	$29.00	$25.25	$28.00		
	7 - 7			$26.67	$29.67	$26.00	$28.00		
	11 - 7	$25.00	$27.00	$27.00	$30.00	$26.00	$28.00		

Palm Beach County

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

CLASSIFICATION	SHIFT	(NEW) Quality Professional M – F	(NEW) Quality Professional SAT/SUN	High Tech Staffing Services, Inc. (OLD) M – F	High Tech Staffing Services, Inc. (OLD) SAT/SUN	High Tech Staffing Services, Inc. (NEW) M – F	High Tech Staffing Services, Inc. (NEW) SAT/SUN
– RNs –							
MED / SURG	7 - 3			$28.84	$32.05	$27.95	$31.09
	7 - 7			$29.20	$32.05	$28.32	$31.09
	3 - 11			$29.91	$32.05	$29.01	$31.09
	7 - 7			$29.91	$32.05	$29.01	$31.09
	11 - 7			$29.91	$32.05	$29.01	$31.09
CRITICAL CARE	7 - 3	$32.00	$36.00	$35.85	$39.59	$34.77	$38.40
	7 - 7	$32.00	$36.00	$36.38	$39.59	$35.29	$38.40
	3 - 11	$33.25	$36.00	$37.45	$39.59	$36.31	$38.40
	7 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
	11 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
TELEMETRY	7 - 3	$32.00	$36.00	$35.85	$39.59	$34.77	$38.40
	7 - 7	$32.00	$36.00	$36.38	$39.59	$35.29	$38.40
	3 - 11	$33.25	$36.00	$37.45	$39.59	$36.31	$38.40
	7 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
	11 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
O.R.	7 - 3	$32.00	$36.00	$35.85	$39.59	$34.77	$38.40
	7 - 7	$32.00	$36.00	$36.38	$39.59	$35.29	$38.40
	3 - 11	$33.25	$36.00	$37.45	$39.59	$36.31	$38.40
	7 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
	11 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
PEDIATRIC	7 - 3			$28.84	$32.05	$27.95	$31.09
	7 - 7			$29.20	$32.05	$28.32	$31.09
	3 - 11			$29.91	$32.05	$29.01	$31.09
	7 - 7			$29.91	$32.05	$29.01	$31.09
	11 - 7			$29.91	$32.05	$29.01	$31.09
PSYCHIATRIC	7 - 3			$35.85	$39.59	$34.77	$38.40
	7 - 7			$36.38	$39.59	$35.29	$38.40
	3 - 11			$37.45	$39.59	$36.31	$38.40
	7 - 7			$37.45	$39.59	$36.31	$38.40
	11 - 7			$37.45	$39.59	$36.31	$38.40
LABOR/DELIVERY	7 - 3	$32.00	$36.00	$35.85	$39.59	$34.77	$38.40
	7 - 7	$32.00	$36.00	$36.38	$39.59	$35.29	$38.40
	3 - 11	$33.25	$36.00	$37.45	$39.59	$36.31	$38.40
	7 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
	11 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40

		(NEW) Quality Professional		High Tech Staffing Services, Inc. (OLD)		High Tech Staffing Services, Inc. (NEW)	
CLASSIFICATION	SHIFT	M – F	SAT/ SUN	M – F	SAT/ SUN	M – F	SAT/ SUN
NEO – ICU	7 - 3	$32.00	$36.00	$35.85	$39.59	$34.77	$38.40
	7 - 7	$32.00	$36.00	$36.38	$39.59	$35.29	$38.40
	3 - 11	$33.25	$36.00	$37.45	$39.59	$36.31	$38.40
	7 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
	11 - 7	$34.50	$36.00	$37.45	$39.59	$36.31	$38.40
– LPNs –							
HOME HEALTH	7 - 3			$22.20	$24.34	$21.76	$23.86
	7 - 7			$22.56	$24.34	$22.12	$23.86
	3 - 11			$23.27	$24.34	$22.81	$23.86
	7 - 7			$23.27	$24.34	$22.81	$23.86
	11 - 7			$23.27	$24.34	$22.61	$23.86
MED – SURG	7 - 3			$22.20	$24.34	$21.76	$23.86
	7 - 7			$22.56	$24.34	$22.12	$23.86
	3 - 11			$23.27	$24.34	$22.81	$23.86
	7 - 7			$23.27	$24.34	$22.81	$23.86
	11 - 7			$23.27	$24.34	$22.81	$23.86
NURSING HOME	7 - 3			$22.20	$24.34	$21.76	$23.86
	7 - 7			$22.56	$24.34	$22.12	$23.86
	3 - 11			$23.27	$24.34	$22.81	$23.86
	7 - 7			$23.27	$24.34	$22.81	$23.86
	11 - 7			$23.27	$24.34	$22.81	$23.86

Palm Beach County

TEMPORARY NURSING AGENCY PROPOSALS FOR PALM BEACH COUNTY

CLASSIFICATION	SHIFT	Olsten (OLD) M – F	Olsten (OLD) SAT/SUN	Olsten (NEW) M – F	Olsten (NEW) SAT/SUN	American Medical Staffing, Inc. (OLD) M – F	American Medical Staffing, Inc. (OLD) SAT/SUN	American Medical Staffing, Inc. (NEW) M – F	American Medical Staffing, Inc. (NEW) SAT/SUN
- RNs -									
MED / SURG	7 - 3	$28.55	$31.95	$27.75	$30.95	$25.00	$29.00	$24.00	$28.00
	7 - 7	$29.00	$31.95	$28.00	$30.95	$25.30	$29.30	$24.30	$28.30
	3 - 11	$29.50	$31.95	$28.60	$30.95	$26.00	$30.00	$25.00	$29.00
	7 - 7	$29.75	$31.95	$29.00	$30.95	$26.60	$30.60	$25.60	$29.60
	11 - 7	$30.25	$31.95	$29.50	$30.95	$27.00	$31.00	$26.00	$30.00
CRITICAL CARE	7 - 3	$36.25	$41.95	$34.95	$40.50	$33.00	$37.00	$32.00	$36.00
	7 - 7	$37.25	$41.95	$35.00	$40.50	$33.30	$37.30	$32.30	$36.30
	3 - 11	$38.75	$41.95	$37.50	$40.50	$34.00	$38.00	$33.00	$37.00
	7 - 7	$39.00	$41.95	$38.00	$40.50	$34.60	$38.60	$33.60	$37.60
	11 - 7	$39.50	$41.95	$38.40	$40.50	$35.00	$39.00	$34.00	$38.00
TELEMETRY	7 - 3	$36.25	$41.95	$34.95	$40.50	$31.00	$35.00	$30.00	$34.00
	7 - 7	$37.25	$41.95	$35.00	$40.50	$31.30	$35.30	$30.30	$34.30
	3 - 11	$38.75	$41.95	$37.50	$40.50	$32.00	$36.00	$31.00	$35.00
	7 - 7	$39.00	$41.95	$38.00	$40.50	$32.60	$36.60	$31.60	$35.60
	11 - 7	$39.50	$41.95	$38.40	$40.50	$33.00	$37.00	$32.00	$36.00
O.R.	7 - 3	$36.25	$41.95	$34.95	$40.50	$33.00	$37.00	$32.00	$36.00
	7 - 7	$37.25	$41.95	$35.00	$40.50	$33.30	$37.30	$32.30	$36.30
	3 - 11	$38.75	$41.95	$37.50	$40.50	$34.00	$38.00	$33.00	$37.00
	7 - 7	$39.00	$41.95	$38.00	$40.50	$36.60	$38.60	$33.60	$37.60
	11 -7	$39.50	$41.95	$38.40	$40.50	$35.00	$39.00	$34.00	$38.00
PEDIATRIC	7 - 3	$36.25	$41.95	$27.75	$30.95	$31.00	$35.00	$30.00	$34.00
	7 - 7	$37.25	$41.95	$28.00	$30.95	$31.30	$35.30	$30.30	$34.30
	3 - 11	$38.75	$41.95	$28.60	$30.95	$32.00	$36.00	$31.00	$35.00
	7 - 7	$39.00	$41.95	$29.00	$30.95	$32.60	$36.60	$31.60	$35.60
	11 - 7	$39.50	$41.95	$29.50	$30.95	$33.00	$37.00	$32.00	$36.00
PSYCHIATRIC	7 - 3	$28.55	$31.95	$27.75	$30.95	$25.00	$29.00	$24.00	$28.00
	7 - 7	$29.00	$31.95	$28.00	$30.95	$25.30	$29.30	$24.30	$28.30
	3 - 11	$29.50	$31.95	$28.60	$30.95	$24.00	$30.00	$25.00	$29.00
	7 - 7	$29.75	$31.95	$29.00	$30.95	$24.60	$30.60	$25.60	$29.60
	11 - 7	$30.25	$31.95	$29.50	$30.95	$27.00	$31.00	$26.00	$30.00
LABOR/DELIVERY	7 - 3	$28.55	$31.95	$27.75	$30.95	$25.00	$29.00	$24.00	$28.00
	7 - 7	$29.00	$31.95	$28.00	$30.95	$25.30	$29.30	$24.30	$28.30
	3 - 11	$29.50	$31.95	$28.60	$30.95	$26.00	$30.00	$25.00	$29.00
	7 - 7	$29.75	$31.95	$29.00	$30.95	$26.60	$30.60	$25.60	$29.60
	11 - 7	$30.25	$31.95	$29.50	$30.95	$27.00	$31.00	$26.00	$30.00

CLASSIFICATION	SHIFT	Olsten (OLD) M – F	Olsten (OLD) SAT/SUN	Olsten (NEW) M – F	Olsten (NEW) SAT/SUN	American Medical Staffing, Inc. (OLD) M – F	American Medical Staffing, Inc. (OLD) SAT/SUN	American Medical Staffing, Inc. (NEW) M – F	American Medical Staffing, Inc. (NEW) SAT/SUN
NEO – ICU	7 - 3	$36.25	$41.95	$34.95	$40.50	$33.00	$37.00	$32.00	$36.00
	7 - 7	$37.25	$41.95	$35.00	$40.50	$33.30	$37.30	$32.30	$36.30
	3 - 11	$38.75	$41.95	$37.50	$40.50	$34.00	$38.00	$33.00	$37.00
	7 - 7	$39.00	$41.95	$38.00	$40.50	$34.60	$38.60	$33.60	$37.60
	11 - 7	$39.50	$41.95	$38.40	$40.50	$35.00	$39.00	$34.00	$38.00
- LPNs -									
HOME HEALTH	7 - 3	$20.25	$21.95	$19.75	$21.25				
	7 - 7	$20.50	$21.95	$19.75	$21.25				
	3 - 11	$20.75	$21.95	$20.00	$21.25				
	7 - 7	$20.75	$21.95	$20.25	$21.25				
	11 - 7	$21.00	$21.95	$20.50	$21.25				
MED – SURG	7 - 3	$21.95	$26.95	$21.25	$25.95	$22.00	$26.00	$21.00	$25.00
	7 - 7	$22.50	$26.95	$21.75	$25.95	$22.30	$26.30	$21.30	$25.30
	3 - 11	$23.50	$26.95	$22.95	$25.95	$23.00	$27.00	$22.00	$26.00
	7 - 7	$24.00	$26.95	$23.25	$25.95	$23.60	$27.60	$22.60	$26.60
	11 - 7	$24.50	$26.95	$23.75	$25.95	$24.00	$28.00	$23.00	$27.00
NURSING HOME	7 - 3	$18.50	$20.75	$17.95	$20.00				
	7 - 7	$18.75	$20.75	$18.25	$20.00				
	3 - 11	$18.95	$20.75	$18.50	$20.00				
	7 - 7	$19.25	$20.75	$18.75	$20.00				
	11 - 7	$19.50	$20.75	$18.95	$20.00				

Palm Beach County

CORPORATE DISCLOSURE STATEMENT

The following entities are parents, affiliates or subsidiaries of Respondents.

Bethesda Healthcare System, Inc.

Bethesda Memorial Hospital, Inc. (Respondent)

Bethesda Physician Hospital Organization, Inc.

Bethesda Ambulance Service, Inc.
Bethesda HBO, Inc.

NHS Bethesda (Joint Venture)

Bethesda Health City, Inc.
Bethesda Holding Company

B.H. Laboratories, Inc.
Bethesda Management Services, Inc.

Prestige Physician Services

Bethesda Med/Surg Specialist, Inc.
Bethesda-Plus, Inc.
Bethesda Wellness Center, Inc.
Bethesda West Ambulatory Surgery Center, Inc.

Bethesda West Surgery Center, LP

Palm Beach Credit Adjustors, Inc.

Bethesda Payroll Services, Inc.
Bethesda Medical Associates, Inc.
Bethesda Medical Buildings, Inc.
Woman's Diagnostic Center of Bethesda, Inc.

Boca Raton Corporation

Boca Raton Community Hospital, Inc. (Respondent)
Boca Raton Community Hospital Foundations, Inc.
Boca Raton Community Hospital Health Plans, Inc.
Boca Raton Community Hospital Home Health Services, Inc.

Boca Raton Community Hospital Imaging, Inc.
Boca Raton Community Hospital Properties, Inc.

Quantum Foundation, Inc.

JFK Medical Center Foundation, Inc.

Quorum Health Resources, Inc.

Jupiter Medical Center (Respondent)
Jupiter Medical Center Foundation, Inc.
Jupiter Pavilion

South Florida Hospital Association, Inc. (Respondent)

South Florida Hospital Association Research Education Foundation
South Florida Hospital Association Health Care Consortium, Inc.

Tenet Healthcare Corporation (Parent of Respondents Pinecrest Rehabilitation Hospital, West Boca Medical Center and Del Ray Community Hospital)

Tenet HealthSystem Holdings, Inc.

Tenet HealthSystem Medical, Inc.

Tenet Management Services, Inc.

Tenet Health Integrated Services, Inc.

Quality Medical Management, Inc.
Mid-Orange Medical Management, Inc.
Alexa Integrated Medical Management, Inc.

Alabama Health Connection, Inc.
Alabama Medical Group, Inc.
American Medical (Central), Inc.

Amisub (Heights), Inc.
Tenet Texas Employment, Inc.
Amisub of Texas, Inc.
Amisub (Twelve Oaks), Inc.
Lifemark Hospitals, Inc.

Tenet Healthcare, Ltd.

Odessa Hospital, Ltd.

Texas Healthcare Physicians Services, Inc.

Amisub (Brownsville MRI), Inc.
Lifemark Hospitals of Florida, Inc.

Palmetto Medical Plan, Inc.
Pain Management Center of Tampa, Inc.
T&C and USF Ob/Gyn Center, Inc.

Lifemark Hospitals of Louisiana, Inc.

Kenner Regional Clinical Services, Inc.

Lifemark Hospitals of Missouri, Inc.

Lifemark RMP Joint Venture

Regional Alternative Health Services, Inc.
Houston Specialty Hospital, Inc.
Memphis Specialty Hospital, Inc.
Tenet Investments-Kenner, Inc.

Texas Southwest Healthservices, Inc.

American Medical Finance Company
American Medical Home Care, Inc.
American Purchasing Services, Inc.
AMI Ambulatory Centres, Inc.

Surgical Services, Inc.

Ambulatory Care – Broward Development Corp.
Surgical Services of South Lauderdale, Inc.
Surgical Services of West Dade, Inc.

AMI Arkansas, Inc.

Healthstar Properties Limited Partnership

Healthstar Ultima, L.L.C.

AMI Brokerage Services, Inc.
AMI Diagnostic Services, Inc.
AMI Information Systems Group, Inc.

American Medical International B.V.

American Medical International N.V.

AMI/HTI Tarzana Encino Joint Venture
Tenet System Services, Inc.
Amisub (American Hospital), Inc.
Amisub (Culver Union Hospital), Inc.

Choice Care Network, Inc.

Amisub Development of South Carolina, Inc.

Hilton Head Clinics, Inc.

Amisub (Florida Ventures), Inc.

PBG Outpatient Services, Inc.
Brookwood Diagnostic Center of Tampa, Inc.
Lauderdale Clinical Services, Inc.
Ft. Lauderdale Surgery Center, Inc.
Tampa MOB 107, Inc.
Tampa MOB 104, Inc.
Tampa 8313 West Hillsborough, Inc.
Tampa 4802 Gunn Highway, Inc.
Center for Quality Care, Inc.
Tampa 418 W. Platt St., Inc.

Amisub (GTS), Inc.
Amisub (Hilton Head), Inc.
Amisub (Irvine Medical Center), Inc.
Tenet HealthSystem Spalding, Inc.

Health International, Inc.
Tenet Primary Care Clinic, Inc.

Amisub (North Ridge Hospital), Inc.

FL Health Complex, Inc.
North Ridge Carenet, Inc.

North Ridge Partners, Inc.
North Ridge Physician-Hospital Organization, Inc.

Amisub of California, Inc.

Valley Doctors' Hospital

Family Medical Services

Physician Practice Management Corporation
Park Plaza Retail Pharmacy, Inc.

Amisub of North Carolina, Inc.
Central Carolina Management Services Organization, Inc.
Amisub (SMHS), Inc.
Amisub of South Carolina, Inc.

Piedmont Medical Services Company
Piedmont One, Inc.
Piedmont Two, Inc.
Piedmont Three, Inc.
Piedmont Fourth, Inc.
Piedmont Five, Inc.
Piedmont Six, Inc.
Piedmont Seven, Inc.
Piedmont Eight, Inc.
Piedmont Nine, Inc.

Amisub (Saint Joseph Hospital), Inc.

Creighton Saint Joseph Regional HealthCare System, L.L.C.
Saint Joseph Mental Health Plans, Inc.
Saint Joseph Mental Health Physicians, Inc.
Home-based Psychiatric Services, Inc.

Amisub (SFH), Inc.
Amisub (Sierra Vista), Inc.
Amisub TGDA, Inc.

Arkansas Healthcare Services, Inc.
Brookwood Center Development Corporation

Hoover Doctors Group, Inc.
Medplex Outpatient Medical Centers, Inc.

Brookwood Development, Inc.

Alabama Health Services, Inc.
Alabama Health Services (St. Clair), L.L.C.
Group Administrators, Inc.

Brookwood Health Services, Inc.

Brookwood Medical Center of Tampa, Inc.
Brookwood – Riverchase Primary Care Center, Inc.
Estes Health Care Centers, Inc.

Central Arkansas Hospital, Inc.

Amisub (Central Arkansas), Inc.

Columbia Land Development, Inc.
Cumming Medical Ventures, Inc.
East Cooper Community Hospital, Inc.

Charleston Health Services Organization, Inc.

Eastern Professional Properties, Inc.
Florida Health Network, Inc.
Frye Regional Medical Center, Inc.

Frye Home Infusion, Inc.
Piedmont Health Alliance, Inc.
Frye Home Care Services, Inc.
Tenet Claims Processing, Inc.

Georgia Health Services, Inc.
Heartland Corporation, Inc.

Prairie Medical Clinic, Inc.
Heartland Physicians, Inc.

Inhalation Therapy Services, Inc.
Kenner Regional Medical Center, Inc.
Lucy Lee Hospital, Inc.
Medical Center of Garden Grove
Medical Collections, Inc.
Mid-Continent Medical Practices, Inc.
Missouri Health Services, Inc.
National Park Medical Center, Inc.

Tenet HealthSystem NPMC Hamilton West, Inc.

New H Holdings Corp.

New H Acute, Inc.

New H South Bay, Inc.

North Carolina Health Services, Inc.
North Fulton Imaging Ventures, Inc.
North Fulton Medical Center, Inc.

North Fulton Health Care Associates, Inc.
North Fulton Regional Cancer Center, Inc.
North Fulton 001, Inc.
North Fulton 002, Inc.
North Fulton 003, Inc.
North Fulton 004, Inc.
North Fulton 005, Inc.
North Fulton 006, Inc.
North Fulton 007, Inc.
North Fulton 008, Inc.
North Fulton 009, Inc.
North Fulton 010, Inc.
North Fulton 011, Inc.
North Fulton 012, Inc.

North Fulton MOB Ventures, Inc.
Occupational Health Medical Services of Florida, Inc.
Palm Beach Gardens Community Hospital, Inc.
Partners in Service, Inc.

Physicians Development, Inc.
Piedmont Home Health, Inc.
Piedmont Rehab Center, Inc.
Pinnacle Healthcare Services, Inc.
Professional Healthcare Systems Licensing Corporation
ProMed Pharmicenter, Inc.
Roswell Medical Ventures, Inc.
Saint Joseph Mental Health Physicians, Inc.
San Dimas Community Hospital
SEMO Medical Management Company, Inc.
Sierra Vista Hospital, Inc.

Tenet HealthSystem Sierra Vista Venture I, Inc.
Tenet HealthSystem Sierra Vista Ventures II, Inc.

South Carolina Health Services, Inc.
St. Mary's Regional Medical Center, Inc.

Amisub (St. Mary's), Inc.
St. Mary's Medical Group, Inc.

Tenet (Brookwood Development), Inc.

Health Advantage Plans, Inc.

Tennessee Health Services, Inc.
Texas Healthcare Services, Inc.
Texas Professional Properties, Inc.
Tenet Caldwell Family Physicians, Inc.
Tenet East Cooper Spine Center, Inc.
Tenet Health Network, Inc.
Tenet HealthSystem Partners, Inc.
Tenet Physician Services of the Southeast, Inc.

HUG Services, Inc.
Assured Investors Life Company

Stanislaus Life Insurance Company

H.F.I.C. Management Company, Inc.

Health Facilities Insurance Corp., Ltd. – Bermuda

International-NME, Inc.

LEIR Canada, Inc.
N.M.E. International (Cayman) Limited – Cayman Islands, B.W.I.

B.V. Hospital Management – Netherlands
Pacific Medical Enterprises Sdn. Bhd. – Malaysia

Hyacinth Sdn. Bhd.

Medicalia International, B.V. – Netherlands
NME Spain, S.A.
NME UK Properties Limited

Tenet Healthcare (Australia) Pty., Limited
NME Headquarters, Inc.
Tenet HealthSystem Hospitals, Inc.

Brookhaven Hospital, Inc.

Brookhaven Pavilion, Inc.

Manteca Medical Management, Inc.
Tenetsub Texas, Inc.
Tenet Hospitals Limited
National Managed Med, Inc.
National Med, Inc.
National Medical Hospital of Tullahoma, Inc.

Harton Medical Group, Inc.

National Medical Hospital of Wilson County, Inc.

Wilson County Management Services, Inc.

National Medical Services, Inc.

Barron, Barron & Roth, Inc.

National Medical Ventures, Inc.

Litho I – LP
McHenry Surgery Center Partners, Ltd – LP
Redding Surgicenter – LP
Alvarado Outpatient Surgery Center – LPO

Tenet Hialeah HealthSystem, Inc.

Hialeah Real Properties, Inc.
Tenet Hialeah (H.H.A.) HealthSystem, Inc.
Tenet Hialeah (ASC) HealthSystem, Inc.

NM Ventures – California, Inc.
NM Ventures of North County, Inc.

North County Outpatient Surgery Center, Ltd.

Tenet HealthSystem Hospitals Dallas, Inc.
NME Medical de Mexico. S.A. de C.V.
NMV Hollywood, Inc.

Hollywood Medical Center – LP

NMV – Tennessee, Inc.
Physician Network Corporation of Louisiana
Laughlin Pavilion, Inc.
NMV-II, Inc.
Preferred Medical Systems of California, Inc.
Rehabilitative Driving Resources, Inc.
West Coast PT Clinic, Inc.
Tenet HealthSystem Memorial Medical Center, Inc.
Tenet Healthcare – Florida, Inc.
Tenet Beaumont Healthsystem, Inc.
Tenet Network Management, Inc.
South Bay Practice Administrators, Inc.
Tenet HealthSystem Sierra Vista Ventures I, Inc.
Tenet HealthSystem Sierra Vista Ventures II, Inc.
Tenet Missouri JV, Inc.
Tenet Birmingham Management, Inc.
Practice Partners, Inc.
MHJ, Inc.

Jonesboro Health Services, L.L.C.

NPMC Healthcenter – The Heart Clinic, Inc.
NPMC Healthcenter – National park Surgery Clinic, Inc.
NPMC Healthcenter – Cardiology Services, Inc.
NPMC Healthcenter – Physicians for Women, Inc.
NPMC Healthcenter Cardiology Care Center, Inc.
Tenet California Medical Ventures I, Inc.
LMC Physician Clinics, Inc.
Diagnostic Imaging Services, Inc.
Metro Physicians Management Organization, Inc.
Tenet Louisiana Medical Ventures I, Inc.
Northeast Texas Healthcare Enterprises
Mid-Tennessee Health Partners, L.L.C.

NME Properties Corp.

Cascade Insurance Company, Ltd.
NME Properties, Inc.

Lake Health Care Facilities, Inc.
NME Properties West, Inc.
NME Property Holding Co., Inc.

NME Rehabilitation Properties, Inc.

R.H.S.C. Prosthetics, Inc.
Rehabilitation Facility at San Ramon, Inc.
Rehabilitation Facility at San Diego
R.H.S.C. Modesto, Inc.
Pinecrest Rehabilitation Hospital, Inc.
R.H.S.C. El Paso, Inc.
Tenet HealthSystem Pinecrest Rehab, Inc.

NME Specialty Hospitals, Inc.

National Medical Specialty Hospital of Redding
NME Management Services, Inc.
NME New Beginnings, Inc.

Addiction Treatment Centers of Maryland, Inc.
Alcoholism Treatment Centers of New Jersey, Inc.
Health Institutes, Inc.

Fenwick Hall, Inc
Health Institutes Investments, Inc.

NME New Beginnings – Western, Inc.

Norquest/RCA – W Bitter Lake Partnership

NME Partial Hospital Services Corporation
NME Psychiatric Hospitals, Inc.

The Huron Corporation

NME Rehabilitation Hospitals, Inc.
Psychiatric Management Services Company

Northshore Hospital Management Corporation (LA)
Syndicated Office Systems
Wilshire Rental Corp.
Women's Medical Center of America, Inc.

Universal Health Services, Inc. (Parent of Respondent Wellington Regional Hospital)

UHS of Delaware, Inc.
Aiken Regional Medical Centers, Inc.
The Arbour, Inc.

Arbour Elder Services, Inc.
ASC of Clarkston, Inc.
ASC of Corona, Inc.
ASC of Las Vegas, Inc.
ASC of Littleton, Inc.
ASC of Midwest City, Inc.
ASC of New Albany, Inc.
ASC of Palm Springs, Inc.
ASC of Ponca City, Inc.
ASC of Springfield, Inc.
ASC of St. George, Inc.
Auburn Regional Medical Center, Inc.
The Bridge Way, Inc.
Children's Hospital of McAllen, Inc.
Comprehensive Occupational and Clinical Health, Inc.

Del Amo Hospital, Inc.
Doctors' General Hospital, Ltd.
Doctors' Hospital of Shreveport, Inc.
Doctors' Hospital of Shreveport, Inc.
Eye West Laser Vision, L.P.
Forest View Psychiatrist Hospital, Inc.
Glen Oaks Hospital, Inc.
Health Care Finance & Construction Corp.
HRI Clinics, Inc.
Hope Square Surgical Center, L.P.

(d/b/a Surgery Centers of the Desert)

Inland Valley Regional Medical Center, Inc.
Internal Medicine Associates of Doctors' Hospital, Inc.
La Amistad Residential Treatment Center, Inc.
Manatee Memorial Hospital, L.P.
McAllen Medical Center, Inc.

(d/b/a Surgical Center of New Albany)

Northern Nevada Medical Center, L.P.

(d/b/a/ Northern Nevada Medical Center)

Northwest Texas Healthcare System, Inc.
The Pavilion Foundation
Pueblo Medical Center, Inc.
RCW of Edmond, Inc.
Relational Therapy Clinic, Inc.
Renaissance Women's Center of Austin, L.P.
Renaissance Women's Center of Edmond, L.L.C.
River Crest Hospital, Inc.
River Oaks, Inc.
River Parishes Internal Medicine, Inc.
Sparks Family Hospital, Inc.
St. George Surgical Center, L.P.

(d/b/a St. George Surgery Center)

St. Louis Behavioral Medicine Institute, Inc.
Summerlin Medical Center, L.P.
Surgery Center of Corona, L.P.

(d/b/a Surgery Center of Corona)

Surgery Center of Littleton, L.P.

(d/b/a Littleton Day Surgery Center)

Surgery Center of Midwest City, L.P.

(d/b/a MD Physicians Surgicenter of Midwest City)

Surgery Center of Odessa, L.P.

(d/b/a Surgery Center of Texas)

Surgery Center of Ponca City, L.P.

(d/b/a Outpatient Surgical Center of Ponca City)

Surgery Center of Springfield, L.P.

(d/b/a Surgery Center of Springfield)

Surgery Center of Waltham, Limited Partnership

(d/b/a Surgery Center of Waltham)

Tonopah Health Services, Inc.
Turning Point Care Center, Inc.

(d/b/a Turning Point Hospital)

Two Rivers Psychiatric Hospital, Inc.
UHS of Belmont, Inc.
UHS of Bethesda, Inc.
UHS of Columbia, Inc.
UHS Croyden Limited
UHS of DeLaRonde, Inc.
UHS of Delaware, Inc.
UHS of Fayetville, Inc.

UHS of Florida, Inc.
UHS of Fuller, Inc.
UHS Holding Company, Inc.
UHS of Illinois, Inc.
UHS International Limited
UHS Las Vegas Properties, Inc.
UHS Leasing Company, Limited
UHS London Limited
UHS of Manatee, Inc.
UHS of New Orleans, Inc.

(d/b/a Chalmette Hospital and River Parishes Hospital)

UHS of New York, Inc.
UHS of Odessa, Inc.
UHS of Pennsylvania, Inc.
UHS of Plantation, Inc.
UHSR Corporation
UHS Receivables Corp.
UHS Recovery Foundation, Inc.
UHS of River Parishes, Inc.
UHS of Riverton, Inc.
UHS of Timberlawn, Inc.
UHS of Vermont, Inc.
UHS of Waltham, Inc.
Universal Health Network, Inc.
Universal Health Pennsylvania Properties, Inc.
Universal Health Recovery Centers, Inc.

(d/b/a UHS KeyStone Center)

Universal Health Services of Cedar Hill, Inc.
Universal Health Services of Concord, Inc.
Universal Treatment Centers, Inc.
Valley Hospital Medical Center, Inc.
Valley Surgery Center, L.P.

(d/b/a Goldring Surgery Center)

Victoria Regional Medical Center, Inc.
Wellington Physician Alliances, Inc.
Wellington Regional Medical Center Incorporated
Westlake Medical Center, Inc.

Supreme Court, U.S.
FILED
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No. 98-989

In The

Supreme Court of the United States

October Term, 1998

QUALITY PROFESSIONAL NURSING, INC., CRITICAL HEALTH CARE, INC., A COMPLETE HEALTH SERVICE, INC., ALL CARE NURSING SERVICE, INC., AND THE PDQ NURSE, INC.,

Petitioners,

v.

BETHESDA MEMORIAL HOSPITAL, INC., JUPITER HOSPITAL, INC., NME HOSPITALS, INC. D/B/A DELRAY COMMUNITY HOSPITAL, JOHN F. KENNEDY MEDICAL CENTER, INC., WELLINGTON REGIONAL MEDICAL CENTER, INC., NME HOSPITALS, INC. D/B/A WEST BOCA MEDICAL CENTER, PINECREST REHABILITATION CENTER, BOCA RATON COMMUNITY HOSPITAL, INC., SOUTH FLORIDA HOSPITAL ASSOCIATION, INC., and HIGH TECH STAFFING SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS

There are no other corporations which are related to the corporations which are the petitioners herein.

TABLE OF CONTENTS

Page

LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONERS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. NO GROUP BUYING EVER OCCURRED UNDER THE PPP, AND THUS IT CANNOT QUALIFY AS A BENIGN GROUP BUYING ARRANGEMENT 3

II. RESPONDENTS CANNOT SHOW THAT QUALITY CONCERNS NECESSITATED PRICE FIXING OR GROUP BOYCOTTING OF AGENCIES 5

III. RESPONDENTS ERR IN ASSERTING THAT *PER SE* CONDEMNATION REQUIRES SHOWINGS OF CONSUMER INJURY AND MARKET POWER 6

IV. COMPETITION FROM AGENCIES FOR NURSE ALLEGIANCE, AND UNWANTED CONSEQUENCES TO HOSPITALS ARISING FROM THAT COMPETITION, CANNOT JUSTIFY PRICE FIXING 8

CONCLUSION 10

APPENDIX TABLE OF CONTENTS ..... App. i

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 8

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 5

FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) 2, 5, 7

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 8

Mandeville Island Farms, Inc. v. American Sugar Co., 334 U.S. 219 (1948) 7

National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965) 7

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 3, 4

Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) 7

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 7, 9

ARGUMENT

In their Petition for Writ of Certiorari ("Pet."), petitioners showed, largely through respondents' own documents and testimony, that the Preferred Provider Program ("PPP") was created by competing hospitals for the express purpose, and with the effect, of halting further free-market price increases during a shortage of nurses. Thus, under well-settled principles of antitrust law, the PPP must be condemned *per se* both as horizontal price fixing (broadly defined to encompass stabilizing and capping of prices), as well as a group boycott in furtherance of price fixing (because the hospitals jointly agreed not to use non-Preferred agencies except on a discriminatory, last-resort basis, to force bidding agencies to submit low bids or risk exclusion).

Respondents, in their Opposition ("Opp."), do not dispute these key facts. They cannot disagree that capping and stabilizing prices was a central goal of the PPP; or that the contracts with the Preferred agencies froze their prices for a year; or that each Preferred agency was required to enter into identical contracts, with identical pricing, with each of the 12 participating hospitals; or that petitioners' nurses deserted them, as respondents' personnel expected; or that after the PPP was preliminarily enjoined, prices again shot up.[1]

Instead, respondents obfuscate the true nature of the PPP in order to persuade this Court to permit it to escape *per se* condemnation. In so doing, they underscore the danger in allowing the Eleventh Circuit's decision below to stand: It signals that competitors, especially in the health care field, can stand the law of supply and demand on its head and still escape antitrust liability, simply by using sophisticated

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[1] That these key aspects of the PPP are beyond dispute led the Eleventh Circuit to conclude: "If we decide the PPP is deserving of per se treatment the case ends; plaintiffs-appellants must win." (Pet.App. 12 n. 12.) The Request for Proposal ("RFP"), sent out by the South Florida Hospital Association ("SFHA") on the hospitals' behalf, underscores that the PPP was a price-fixing and group boycott arrangement. (See Opp.App. 43-61, especially ¶¶ 7, 13, 15, 16, 19, 30, and 59.)

schemes, blatantly concocted to achieve price fixing, so as to appear too complex and novel for imposition of *per se* illegality – a classic elevation of form over substance.[2]

Respondents' obfuscation is evinced by four entirely spurious lines of defense at the crux of their Opposition:[3] (1) that the PPP was merely procompetitive group buying, even though no group buying ever was to take place; (2) that unspecified "efficiencies" and the inclusion of separable (but never implemented) quality assurance functions in the price-fixing scheme exempt it from *per se* illegality; (3) that injury to consumers and market power must be shown by petitioners, even though settled law is squarely to the contrary; and (4) that some insupportable "economic necessity defense" justifies the hospitals' price-fixing arrangement.[4]

---

[2] This Court need only review respondents' 16-page Corporate Disclosure Statement (Opp.App. 83-98) to see that many large, publicly-traded companies, owning hospitals across the nation, are involved here and have a stake in the outcome.

[3] Respondents also contend – without legal support – that the hospitals did not agree on specific price levels, and that "any supply contract 'stabilizes' prices" (Opp. 22). But the hospitals jointly agreed which bid prices to accept, and purposely created the mechanism by which prices were to be stabilized, giving rise to liability under well-settled principles enunciated by this Court (see Pet. 19-23). And while any one-on-one contract "stabilizes" prices *pro tanto*, the terms of the contracts under the PPP were set by **joint** conduct among competing hospitals. "Every such horizontal arrangement among competitors poses some threat to the free market." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990).

[4] Respondents' Appendix includes chopped-up excerpts from trial testimony, devoid of identification of the witnesses. Worse, many of respondents' factual assertions in their brief are not, upon inspection, supported by their cites to their Appendix, and in fact are contrary to the record (*e.g.*, their assertion that the shortage ended [Opp. 3]). To correct key misstatements, petitioners have included an Appendix ("Rep.App.") herewith.

I. NO GROUP BUYING EVER OCCURRED UNDER THE PPP, AND THUS IT CANNOT QUALIFY AS A BENIGN GROUP BUYING ARRANGEMENT

Respondents disingenuously assert that "the Program utilized the familiar mechanism of a group buying program" (Opp.Br. p. 6), despite the proof, in their own RFP (Opp.App. 43-61), that **there was no group buying under the Program**, no aggregation of purchasing volumes, no volume assurances at all, and express provisions that any purchases would be one-on-one between an individual hospital and a Preferred agency (albeit at the prices determined collectively):

> The South Florida Hospital Association is neither the guarantor nor the indemnitor nor makes any warranties, whatsoever, either as to any minimum aggregate volume of services utilized by the participating hospitals nor as to any other question involving the contractual relationship, which may arise between the agency and individual hospitals. [Opp.App. 44.]
>
> * * *
>
> 9) *MEMBERS WILL CONTRACT DIRECTLY* with the awarded Agency(ies). Members will remit payments directly to Agency(ies) after receipt of correct invoices. [*Id.* at 48.]
>
> * * *
>
> 17) *ESTIMATED VOLUMES*: The volumes indicated on page 20 is [sic] an estimate only AND should not be construed as a volume guarantee, either expressed or implied. Usage information was obtained from surveys of participating hospitals and are [sic] submitted for informational purposes only. [*Id.* at 50.]

Respondents' defense of legitimate group buying arrangements – under which smaller buyers pool their purchasing volumes to get lower prices enabling them to compete with larger buyers (*Northwest Wholesale Stationers, Inc. v. Pacific Wholesale Stationery & Printing Co.*, 472 U.S. 284, 295 (1985)) – is inapt. Respondents make no effort to identify

any larger buyers getting lower agency prices with which respondents sought to be competitive (there were none), and can point to no procompetitive benefits of the PPP's price-fixing and group boycott features.[5]

Respondents attempt to deceive this Court about the PPP's nature, by asserting that the "participating hospitals agreed to utilize the preferred agencies first, **thereby increasing their sales volumes**" (Opp. 16-17; emphasis added). However, the record below shows that precisely the opposite happened, **as even the hospitals' own economic expert conceded**, and other defense witnesses confirmed (Rep.App. 1-3, 9-15).

Respondents also disingenuously assert (Opp. 6-7) that the PPP "integrated certain purchasing functions." However, **none** of the three functions they enumerate – a quality assurance "nurse liaison," assessment of a fee to cover her expense, and the decision of which agencies would be boycotted – had any connection to the purchasing of nursing services.[6] **After** each agency was forced to conform its prices to each hospital, regardless of volume usage, **every aspect of actual purchasing** – *i.e.*, every purchasing function – was done separately by

---

[5] Respondents incorrectly, and without support, state that "every joint purchasing agreement entails an agreement whereby purchasers literally 'fix' prices and 'refuse to deal' with certain suppliers" (Opp. 15). Rather, legitimate group buying arrangements enable smaller buyers to obtain prices already freely available on the open market to any buyers offering comparable volume – there is no "fixing" of prices (however defined) contrary to free-market forces. Hence, as this Court noted in *Northwest Wholesale*, *supra*, 477 U.S. at 296, unless a buying group possesses market power (or exclusive access to an essential element to compete), no concern arises that its conduct would have anticompetitive effects. But this point is irrelevant, because the PPP did not involve group buying at all.

[6] Rep.App. 7-8. The lack of any nexus between the nurse liaison and purchasing functions is shown by the fact that, for the PPP's duration, the nurse liaison implemented no quality assurance procedures whatever, despite the purchase of "$2 million in temporary services" (Opp. 8). See Rep.App. 4-6.

each hospital, **not** in a collective or integrated manner. Respondents can offer no evidence to the contrary.

In sum, when the dust of respondents' phony "group buying" claim settles, all that remains is that under the PPP, the hospitals jointly fixed the terms of all later, individually-made purchases, falling squarely within the ambit of *per se* illegal conduct under joint guidelines of the Department of Justice and the FTC (see Pet. 26-27 n. 18).

II. RESPONDENTS CANNOT SHOW THAT QUALITY CONCERNS NECESSITATED PRICE FIXING OR GROUP BOYCOTTING OF AGENCIES

Respondents (Opp. 22-24) woefully misconceive the thrust of this Court's decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There is a presumption favoring rule-of-reason treatment where conduct is not shown to fall into a recognized category of *per se* illegality. But where conduct is shown to fall into a *per se* category – such as horizontal price fixing, and group boycotts in furtherance of price fixing – the *per se* rule governs. As this Court held in *Superior Court, supra*, 493 U.S. at 433, the *per se* rule has the same force as other statutory commands and must be applied by the courts. And where, as here, the challenged conduct, in substance, falls squarely within a *per se* illegal category, it must be condemned, unless it qualifies for the very narrow escape hatch under *BMI* and its progeny (see Pet. 23-25). No such showing has ever been made here, and respondents offer none.

Respondents' confusion is evinced by their assertion that group buying arrangements amount to literal price fixing (an error addressed above), leading them to err in concluding that the rule-of-reason treatment of buying cooperatives under *BMI* requires that horizontal price fixing by buyers also receive lenient treatment. *BMI* says nothing of the kind.[7]

---

[7] In *BMI*, this Court noted that the arrangement in question there – *viz.*, blanket licensing of music – "is of course potentially beneficial to both

Respondents predictably focus (Opp. 4-5) on perceived quality problems that hospitals were experiencing with agencies and agency nurses. However, no showing is made, or even attempted, that the hospitals needed the price-fixing and group boycotting features of the PPP to address quality concerns – *i.e.*, that the price-fixing and boycotting features were ancillary to otherwise unattainable procompetitive benefits. Respondents do not dispute that the hospitals already had "do not use" lists of unsatisfactory nurses which they could have exchanged (see Pet. 24 n. 16).

Instead, respondents again misrepresent the record, and even contradict themselves by asserting that "[t]here were no ready means for effectively sharing this information [about unsatisfactory nurses]" (Opp. 4), shortly before admitting that there was already a Palm Beach County Nursing Administrators Association (Opp. 6). Indeed, defense witness June Daugherty, of participating hospital Palms West, testified that agency problems were already being discussed by that group, and that she knew of no reason why quality concerns could not have been discussed without addressing prices (Rep.App. 16-17, 7).

III. RESPONDENTS ERR IN ASSERTING THAT *PER SE* CONDEMNATION REQUIRES SHOWINGS OF CONSUMER INJURY AND MARKET POWER

Respondents incorrectly assert that there must be a showing of detriment to consumers, such as higher prices or output

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sellers and buyers, differentiat[ing] the blanket license from individual use licenses" (441 U.S. at 21). Here, the PPP was not beneficial to agencies (even Preferred agencies, Opp. 10-11) or to nurses. Respondents dispute that agencies were "forced" to submit bids (Opp. 18), but offer no basis for their position; in contrast, petitioners showed that no hospital acting alone could have imposed the price-freeze that respondents imposed (Pet. 4), and that the agencies did not favor having the PPP – including respondent High Tech Staffing Services, which bid under coercion, fearful of losing its million-dollar business (Pet. 5-6 n. 5).

restrictions, to trigger *per se* illegality.[8] But as this Court noted in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948):

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.

Respondents' assertion that consumer injury is required would mean that any price-fixing conspiracy among buyers, engaged in to lower their own costs artificially but without raising consumer prices, would escape *per se* condemnation. That is not the law, as even the Eleventh Circuit below recognized (Pet.App. 13). Rather, it is settled that consumers benefit most from open competition, the value of which is beyond challenge. *Superior Court, supra*, 493 U.S. at 424.[9]

Respondents also seek to distinguish the Seventh Circuit's *per se* condemnation of conduct among competing buyers of durum wheat in *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965), by insisting that the key factor there was the defendants' possession of market power (Opp. 19). To the contrary, the Seventh Circuit squarely held that it "makes no difference . . . whether the participants possess market control. . . . " 345 F.2d at 427.[10]

---

[8] Respondents ignore petitioners' showings that rising pre-PPP prices were inducing nurses to return to the market (Pet. 4), but that the PPP, by freezing prices, exacerbated the shortage and restricted nursing service output (Pet. 28-29). Ironically, respondents complain about "phantom" and "blind" booking (Opp. 4), problems stemming from the shortage and worsened by the PPP.

[9] On this same flawed basis, respondents (Opp. 20-21, 25-26) improperly seek to distinguish this Court's rulings in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), *Superior Court, supra*, and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[10] The output restriction caused by the PPP, and its blatant tampering with free-market pricing mechanisms, also would merit condemnation of the PPP under the rule of reason, without determination of relevant market

IV. COMPETITION FROM AGENCIES FOR NURSE ALLEGIANCE, AND UNWANTED CONSEQUENCES TO HOSPITALS ARISING FROM THAT COMPETITION, CANNOT JUSTIFY PRICE FIXING

Respondents (Opp. 2-4) seek to fashion a new "economic necessity defense" by asserting that the nursing shortage and the resulting agency price increases wreaked havoc for the hospitals, as they competed for patients. However, as this Court noted in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), in discussing and quoting from *Socony-Vacuum*, *supra* (which dealt with the converse situation of competitors jointly seeking to cope with a surplus):

> In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:
>
> > "**Any combination which tampers with price structures is engaged in an unlawful activity.** Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or

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and market power issues (Pet. 28-29). Respondents (Opp. 27 n. 7) demonstrate complete misunderstanding of these principles, by citing to this Court's discussion of **tying** claims in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-30 (1984), and to two Tenth Circuit decisions dealing with denial of physician staff privileges and replacement of plaintiff radiologist group with another group, where no showing was made that the defendants' conduct did more than affect the plaintiffs themselves – in stark contrast to the instant case, where injury was shown to petitioners, other non-Preferred agencies, and even the Preferred agencies (Pet. 10-11). Respondents' assertion (Opp. 8-9) that the PPP did not injure the petitioners, aside from being wrong, should be addressed by a jury upon remand of this action following reversal by this Court.

> stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. **It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.** It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the combination. If such a shift is to be made, it must be done by the Congress. . . . " [*Socony-Vacuum*, 310 U.S. at 221-22.]

Arizona, 457 U.S. at 345-46 (emphasis added).

Here, the respondent-hospitals cannot even complain of "ruinous competition and competitive evils." Despite their vague cries of higher nursing agency prices and budgeting difficulty, nowhere, either in their Opposition or in the record below, have the hospitals ever shown that agency competition caused any hospital to be in danger of going out of business, or even to become briefly unprofitable. (The only "ruinous" effects here were those caused by the PPP itself, which proved catastrophic for the petitioners, as shown by the unchallenged evidence of the massive desertion of their nurses in the wake of the PPP [Pet. 10 & n. 7].) But even if the hospitals had suffered disastrous consequences from competition with the agencies, their efforts should have been directed to Congress, not to taking the law into their own hands through the PPP. It is now left to this Court to redress this wrong, and to undo the damage which the Eleventh Circuit's ruling below poses to the free market.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX

TABLE OF CONTENTS

Page

Excerpts From Testimony Of Ira Horowitz .....App. 1

Excerpts From Testimony Of Joan Moretz .....App. 4

Excerpt From Testimony Of Sharyn Tremblay Roettger .....App. 11

Excerpts From Testimony Of Linda Wadkins ...App. 13

Excerpt From Testimony Of Mimi Larkin.....App. 15

Excerpt From Testimony Of June Daugherty....App. 16

EXCERPTS FROM TRIAL TESTIMONY OF IRA HOROWITZ, DEFENSE WITNESS, ECONOMIC EXPERT FOR RESPONDENTS/DEFENDANTS

[p. 4634] Thereupon, IRA HOROWITZ, called as witness on behalf of the Defendants, having previously been by the Court duly sworn, testified further as follows:

. . .

[p. 4659] Q. There was absolutely zero volume guarantee in that program; isn't that true, doctor?

A. Oh, that's correct.

Q. Okay. And in fact, what happened to those preferred provider agencies was that their volumes did not go up because of that program; isn't that true?

A. Yes, I believe that's true.

Q. In fact, their volumes went down, didn't they?

A. Over what period are we talking about?

Q. Oh, let's just talk about January 1989. That would be a peak time for hospitals to be wanting to rely on temp agencies, correct?

A. Yes, I believe that's true.

Q. There's evidence in this case that in fact au contrare in January of 1989 the preferred provider agencies were finding that the hospitals were calling them less and less, isn't that true?

A. I am only hesitating because I simply don't recall those details. But if you tell me it's true, I am happy to accept that fact, yes.

Q. Well, your understanding is that this [p. 4660] program officially took off, it was put into effect in early November of 1988, correct?

A. Yes.

Q. And you understand that February 21, 1989, an injunction was entered by a court of law to supposedly stop this program, correct?

A. That's correct.

Q. So we are talking about approximately a four-month period, right?

A. Yes, sir.

Q. And all four of those months really are during peak season here, aren't they?

A. Yeah.

Q. You understand that even High Tech lost business during that time?

A. I understand that High Tech wasn't terribly happy with the results of having been involved in the preferred provider program.

Q. And you found that out through testimony here or through your conversations with Tom Larkin?

A. I think both. It's hard for me to separate where I learned what.

Q. Well, regardless, you have no doubt about that being true, correct?

A. I have no doubt about that being true, [p. 4661] correct.

. . .

[p. 4663] Q. Okay. Let me go back then. I apologize. I think basically what you were telling the jury was assuming that the hospitals participating in the preferred provider program did not collectively have monopsony power, you would expected [sic] temp agency usage by the hospitals to go up. Is that a fair characterization?

A. That is a fair characterization.

Q. And in fact, sir, the usage went down, [p. 4664] didn't it?

A. I believe that's true.

EXCERPTS FROM TRIAL TESTIMONY OF JOAN MORETZ, DEFENSE WITNESS, WHO WAS THE NURSE LIAISON FOR THE PPP

[p. 2672] Thereupon, JOAN MORETZ, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 2712] Q. Have you had an opportunity to read through the transcript of the sworn testimony that you gave in 1990 sometime prior to taking the witness stand today?

A. Yes.

Q. Let me ask you again, referring to that same deposition, ma'am, at page 29 of that deposition, beginning at line 23: [p. 2713]

> Q. As I understand it, you are saying the interview, or you first heard about the job January or February of 1989?
>
> A. Uh huh.
>
> Q. Is that right?
>
> A. Right.

Do you recall having given those responses under oath back in 1990?

A. Yes.

. . .

[p. 2716] Q. And as far as you got in the fulfillment of any of your responsibilities was talking about what you were going to do sometime in the future, correct?

A. No.

[p. 2717] Q. Well, you told us that you also developed this proposed form, Defendants' Exhibit 6224, a nursing quality control form, right?

A. Right.

Q. And this form is dated February 22, 1989, correct?

A. Right.

Q. This was going to be the tool that you were going to use to fulfill whatever quality related responsibilities you had, correct, ma'am?

A. This was the first draft.

Q. Do you have even one of these forms that's completed on even one nurse?

A. It hadn't been implemented as yet.

Q. Could you explain to the ladies and gentlemen of the jury how it is that this program that you have represented had as, at least one of its primary purposes, improvement of quality, and had a form that was to be the tool to improve quality, could have lasted from November to December to January to February and not have one completed form relating to quality ever filled out in that period of time?

A. What is your question?

Q. Can you explain to the ladies and [p. 2718] gentlemen of the jury how if a primary purpose of this program was improvement of quality, how it is that this quality form was never filled out even once in the entire history of the preferred provider program?

A. It was a new form. It was in draft. You wouldn't have put a form into place until you were sure or felt fairly sure that it would be accepted by all and it would be effective. And there had not been enough time to implement the program.

Q. Well, you are aware that the price controls got put in immediately, right?

A. Yes.

Q. But there were no quality controls that were ever implemented, were there, ma'am?

A. I believe there was. I believe we had initiated quality controls.

Q. You had initiated talking about initiating quality controls, right?

A. No. I believe my presence going and trying to work with both facilities, both hospital and agencies, was an attempt at trying to standardize quality so that we were communicating what our needs were.

Q. Okay. Maybe you would like to share with [p. 2719] us, if you would, then whatever documentary evidence exists that anything was ever done by the preferred provider program to improve quality? Is there anything at all that's been documented?

A. Just our preliminary meetings in February of that year.

Q. Which document the fact that you were talking about initiating quality controls?

A. Right.

. . .

[p. 2726] Q. Have you ever heard of an organization called the Palm Beach County Nursing Administrators Group?

A. Yes.

Q. What's your understanding of what that group is or was?

A. I believe it was a group of nursing administrators who jointly met to discuss common issues and problems we might be having within this county, as well as trying to improve quality of patient care.

Q. Did you have an understanding as to whether part of their discussions included quality of temp agency nurses?

A. I have no knowledge of that, but I would assume so.

Q. That organization, do you understand it, existed separate and apart from the preferred provider program, correct?

A. I believe so.

. . .

[p. 2727] Q. Did you have any concerns in your work with the preferred provider program with regard to what rates were being paid by temp agencies?

A. No.

Q. That was totally outside of the ambit of your responsibility, correct?

A. Correct.

Q. In fact, by the time you came there the [p. 2728] whole pricing issue was a fait accompli; isn't that true? It was already an established fact of what was being paid, correct?

A. Yes.

Q. Same is true with regard to the issue of whether there would be any limitations on the number of preferred agencies that would participate, correct? That was already decided before you came, correct?

A. Yes.

. . .

[p. 2729] Q. . . . How was this program going to work? Were the hospitals going to call you and say we need nurses for such and such time slot and then you were going to call the agencies and fill that for them?

A. No.

Q. How was it going to work then?

A. The calls went directly to the agencies.

Q. From the hospitals?

[p. 2730] A. Yes.

. . .

[p. 2731] Q. Isn't it true that in your investigation you found that these hospitals already had quality standards in place?

A. Yes.

Q. In fact, they were required to have quality standards in place, weren't they?

A. Yes.

Q. Would have been very irresponsible for them not to, wouldn't it?

A. Yes.

Q. Do you recall learning while you were involved in the preferred provider program that the hospitals were experiencing a slow season and were not placing as many orders with the preferreds as the preferred agencies had expected? Does that strike a familiar note?

A. Yes.

. . .

[p. 2734] Q. And in fact, there was a, as you described it before, a significant nursing shortage at that time; is that right, ma'am?

A. Yes.

Q. And in order to – was it your understanding, however, that in spite of that shortage, very shortly after the program went into effect, the hospitals were reporting that they had an unexpected drop in demand for nurses; isn't that right, ma'am?

A. Yes.

Q. In spite of the fact that you were going into the season in Palm Beach County when census should be up, that is November, December, January, hospital admissions in census are traditionally up in that period of time?

A. Yes.

Q. But in spite of that, and in spite of the fact that the hospitals were largely directing their business toward

eight preferred providers, the hospitals were reporting that their demand for temporary nursing services was unexpectedly down immediately after the program; is that right, [p. 2735] ma'am?

A. Yes.

EXCERPT FROM TRIAL TESTIMONY OF SHARYN TREMBLAY ROETTGER, DEFENSE WITNESS, FORMER ASSISTANT ADMINISTRATOR OF NURSING SERVICE FOR DEFENDANT WELLINGTON REGIONAL MEDICAL CENTER

[p. 2869] Thereupon, Sharyn Tremblay Roettger, called as a witness on behalf of the defendants, being by the court first duly sworn, was examined and testified as follows:

. . .

[p. 2931] Q. And isn't it true that really your purpose, one of your purposes at least insofar as agency is concerned, insofar as nursing agency is [p. 2932] concerned from the beginning of your employment at Wellington up through July of 1989 was to try to reduce or eliminate agency usage in the hospital?

A. Correct.

Q. And the preferred provider program was a step in that direction –

A. Yes.

Q. – is that right? And by July of 1989 your agency usage was down significantly in large part because of an increase of nurses that had come on staff; is that right, ma'am?

A. That and the fact that it's the summer months and the census goes down in the summer.

Q. Okay. But that happens every summer.

A. Yes.

Q. But the unusual thing was that in the midst of this crisis of nursing shortage Wellington Hospital after the

preferred provider program had a significant increase of the number of nurses that had taken or accepted full-time employment or per diem status.

A. True.

Q. And isn't it really true, ma'am, that that increase, that influx of people taking [p. 2933] positions at the hospital that they previously had not wanted to take was a result of this preferred provider program? Didn't that cause the nurses to come back and take those positions at the hospital you previously hadn't been able to fill?

A. True.

EXCERPTS FROM TRIAL TESTIMONY OF LINDA WADKINS, DEFENSE WITNESS, FORMER VICE PRESIDENT OF PATIENT SERVICES FOR DEFENDANT BETHESDA MEMORIAL HOSPITAL

[p. 3008] Thereupon, LINDA WADKINS, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 3090] Q. Didn't the preferred agencies start complaining in January because they weren't getting the calls from the hospitals that participated in the program, including Bethesda, that they expected?

A. I believe so. I don't know if it was in January. But at some point in time there was that complaint that they weren't getting volume.

Q. That was before the injunction came along, right?

A. When did the injunction exactly come along?

Q. Well, let's assume it was February 21, 1989.

A. Then if that happened in January it was before then. But I don't really remember when they complained is what I said. I do know they complained, but I don't remember when.

. . .

[p. 3092] Q. And that would have included November, December of 1988, correct? You were there then, right?

A. I was there. But I don't know if that's exactly when we had an increase that year. But I am telling you it's

probable that we did have an increase that year because almost every year we did have one.

Q. As of the time the preferred provider program was put into effect, Bethesda could offer more money to its nurses, to nurses to attract them, correct?

A. When it was put in effect?

Q. Yes. Nothing was stopping you under the preferred provider program from offering more money –

[p. 3093] A. No nothing was stopping us.

Q. – just like you mentioned, right?

A. Right.

Q. But the preferred provider agencies weren't in that position, were they?

A. To offer their nurses more money?

Q. Right. They couldn't do that, could they?

A. I guess if they decided their profits could be less, they could. I don't know what their individual profit margins were. But they probably had to look at that.

Q. Well, they were locked into a ceiling – they were locked into rates for an entire year, were they not, under that program?

A. That's correct.

EXCERPT FROM TRIAL TESTIMONY OF MIMI LARKIN, DEFENSE WITNESS, DIRECTOR OF NURSING FOR DEFENDANT HIGH TECH

[p. 3795] Thereupon, Mimi Larkin, called as a witness on behalf of the defendants, being by the Court previously first duly sworn, was further examined and testified as follows:

. . .

[p. 3801] Q. Was it your belief at the time that you were announced as being a preferred provider, that is, at the time High Tech was selected as a preferred provider, that that was going to mean an increase in volume for hospital staffing for High Tech?

A. That's what we thought.

Q. That didn't happen, did it?

A. No.

Q. In fact, ma'am, during the few months that the preferred provider program was officially in place before the injunction High Tech's hospital staffing business went down, didn't it?

A. Yes.

EXCERPT FROM TRIAL TESTIMONY OF JUNE DAUGHERTY, DEFENSE WITNESS, CHIEF NURSING OFFICER FOR FORMER DEFENDANT PALMS WEST HOSPITAL

[p. 2736] Thereupon, JUNE DAUGHERTY, called as a witness on behalf of the Defendants, being by the Court first duly sworn, was examined and testified as follows:

. . .

[p. 2784] Q. Okay. Palm Beach County nursing administrators, they have a group, don't they?

A. Yes, we do.

Q. Are you part of that group?

A. Yes, sir.

Q. That existed before the preferred provider program ever was dreamed up; isn't that true?

A. Yes, sir.

Q. Did you ever discuss agency problems at [p. 2785] the meetings of that group?

A. Yes, we did.

Q. You were concerned as a group about quality of agencies, weren't you?

A. Yes, sir.

Q. I mean, among other things. That was one of the things, wasn't it?

A. Yes, sir.

Q. Okay. Was there any reason you can think of for why you folks at that nursing organization couldn't have gotten together and just sought to have quality standards addressed for all temp agency nurses without getting into issues of price and long-term contracts? Is there anything to have stopped you from doing that?

A. We did not have anyone to lead us in that.

Q. Could you have selected a leader?

A. Yes, sir.

Q. Peter Faron, he was a member of that group, wasn't he?

A. Yes, he was.

Q. He took quite an active leadership role in this PPP, this preferred provider program; isn't that true?

[p. 2786] A. I remember that he did, yes.

Q. Could Peter Faron have led you, that is this group of nursing administrators, into a program for quality that had nothing whatever to do with price?

A. I am sorry, I don't know that.

Q. Do you have any reason to believe that couldn't have happened?

A. I don't have any reason to believe it could not have happened, no.